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TITLE 5

CRIMINAL OFFENSES

(CHAPTERS 50-79 IN VOLUME 3B)

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SUBTITLE 1. GENERAL PROVISIONS

CHAPTER 1

GENERAL PROVISIONS

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5-1-102. Definitions.

As used in the Arkansas Criminal Code:

(1) "Act" or "action" means the same as defined in § 5-2-201;

(2) "Actor" includes, when appropriate, a person who possesses something or who omits to act;

(3) "Conduct" means the same as defined in § 5-2-201;

(4) "Deadly weapon" means:

(A) A firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious physical injury; or

(B) Anything that in the manner of its use or intended use is capable of causing death or serious physical injury;

(5) "Element of the offense" means the conduct, the attendant circumstances, or the result of conduct that:

(A) Is specified in the definition of the offense;

(B) Establishes the kind of culpable mental state required for commission of the offense; or

(C) Negates an excuse or justification for the conduct;

(6)(A) "Firearm" means any device designed, made, or adapted to expel a projectile by the action of an explosive or any device readily convertible to that use.

(B) "Firearm" includes:

(i) A device described in subdivision (6)(A) of this section that is not loaded or lacks a clip or another component to render it immediately operable; and

(ii) Components that can readily be assembled into a device described in subdivision (6)(A) of this section;

(7) "Included offense" means the same as defined in § 5-1-110(b);

(8)(A) "Knowingly" or an equivalent term such as "knowing", "with knowledge", "willful", or "willfully" means the same as "knowingly" defined in § 5-2-202.

(B) However, if the statute clearly indicates a legislative intent to require a culpable mental state of "purposely", "willful" or "willfully" means the same as "purposely" defined in § 5-2-202;

(9) "Law" includes a statute or court decision;

(10) "Law enforcement officer" means any public servant vested by law with a duty to maintain public order or to make an arrest for an offense;

(11) "Negligently" or an equivalent term such as "negligence" or "with negligence" means the same as defined in § 5-2-202;

(12) "Omission" or "omit to act" means the same as defined in § 5-2-201;

(13)(A) "Person", "actor", "defendant", "he", "she", "her", or "him" includes:

(i) Any natural person; and

(ii) When appropriate, an "organization" as defined in § 5-2-501.

(B)(i)*(a)* As used in §§ 5-10-101 — 5-10-105, "person" also includes an unborn child in utero at any stage of development.

(b) "Unborn child" means a living fetus of twelve (12) weeks or greater gestation.

(ii) This subdivision (13)(B) does not apply to:

(a) An act that causes the death of an unborn child in utero if the act was committed during a legal abortion to which the woman consented;

(b) An act that is committed pursuant to a usual and customary standard of medical practice during diagnostic testing or therapeutic treatment; or

(c) An act that is committed in the course of medical research, experimental medicine, or an act deemed necessary to save the life or preserve the health of the woman.

(iii) Nothing in this subdivision (13)(B) shall be construed to allow the charging or conviction of a woman with any criminal offense in the death of her own unborn child in utero;

(14) "Physical injury" means the:

(A) Impairment of physical condition;

(B) Infliction of substantial pain; or

(C) Infliction of bruising, swelling, or a visible mark associated with physical trauma;

(15) "Possess" means to exercise actual dominion, control, or management over a tangible object;

(16) "Public servant" means any:

(A) Officer or employee of this state or of any political subdivision of this state;

(B) Person exercising a function of any officer or employee of this state or any political subdivision of this state;

(C)(i) Person acting as an adviser, consultant, or otherwise in performing any governmental function.

(ii) However, this subdivision (16)(C) does not include a witness; or

(D) Person elected, appointed, or otherwise designated to become a public servant although not yet occupying that position;

(17) "Purposely" or an equivalent term such as "purpose", "with purpose", "intentional", "intentionally", "intended", or "with intent to" means the same as "purposely" as defined in § 5-2-202;

(18) "Reasonably believes" or "reasonable belief" means a belief:

(A) That an ordinary and prudent person would form under the circumstances in question; and

(B) Not recklessly or negligently formed;

(19) "Sawed-off or short-barreled rifle" means:

(A) A rifle having one (1) or more barrels less than sixteen inches (16") in length; or

(B) Any weapon made from a rifle, whether by alteration, modification, or otherwise, if the weapon, as modified, has an overall length of less than twenty-six inches (26");

(20) "Sawed-off or short-barreled shotgun" means:

(A) A shotgun having one (1) or more barrels less than eighteen inches (18") in length; or

(B) Any weapon made from a shotgun, whether by alteration, modification, or otherwise, if the weapon, as modified, has an overall length of less than twenty-six inches (26");

(21) "Serious physical injury" means physical injury that creates a substantial risk of death or that causes protracted disfigurement, protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ; and

(22) "Statute" includes the Arkansas Constitution and any statute of this state, any ordinance of a political subdivision of this state, and any rule or regulation lawfully adopted by an agency of this state.

History. Acts 1975, No. 280, § 115; A.S.A. 1947, § 41-115; Acts 1994 (2nd Ex. Sess.), No. 45, § 2; 1999, No. 1273, §§ 1-3; 1999, No. 1476, § 1; 2005, No. 1994, § 442; 2007, No. 827, § 11.

Amendments. The 2007 amendment, in (13)(B)(ii)(c), substituted "woman" for "mother" and made a stylistic change.

CASE NOTES

Analysis

Element of Offense.
Person.
Physical Injury.
Possess.
Reasonable Belief.
Serious Physical Injury.

Element of Offense.

Because defendant presented evidence arguably supporting self defense or a justification defense to a charge of aggravated assault under Arkansas law, the government had to negate that defense by a preponderance of the evidence for an enhancement for using the firearm in connection with another felony offense under U.S. Sentencing Guidelines Manual § 2K2.1(b)(5) [now (b)(6)] (2005), to apply because whether circumstances negated defendant's excuse or justification was an element of the offense under subdivision (5)(C) of this section, which had to be proved by the state under § 5-1-111(a)(1), and the definition of aggravated assault expressly excluded any person acting in self-defense or the defense of a third party under § 5-13-204(c)(2). United States v. Raglin, 500 F.3d 675 (8th Cir. 2007).

Person.

District court concluded that the Arkansas Supreme Court would extend its decision in Aka, which held that wrongful death suits could be brought on behalf of unborn, viable fetuses, to allow a negligence suit to be filed on a child's behalf, seeking to recover for alleged negligently inflicted injuries that the child sustained in utero. The district court noted that the state supreme court had found persuasive the state legislature's decision to expand the definition of "person" in the homicide and probate laws, subdivision (13)(B)(i)(b) of this section, § 28-1-118(a), to include viable fetuses, thereby giving statutory protection to unborn children, and that it would be absurd to think that less protection would be provided under Arkansas law to children who suffered in utero injury, but nevertheless managed to be born. Crussell v. Electrolux Home Prods., 499 F. Supp. 2d 1137 (W.D Ark. 2007).

Physical Injury.

Defendant's suspended sentence was properly revoked under § 5-4-309(d), where the state proved that defendant committed third-degree domestic battery under § 5-26-305(a), by showing that defendant inflicted physical injury under subdivision (14) of this section by pulling his wife's hair and throwing her against a vehicle. Andrews v. State, 2009 Ark. App. 624, — S.W.3d — (2009).

During a hearing on the state's petition to revoke a defendant's suspended sentence, defendant admitted that he slapped his pregnant wife and a responding officer testified to a personal observation of the swollen knot on the wife's cheek and knot over the wife's right eye from being hit; this evidence was sufficient to find that

defendant inexcusably violated a condition of that suspension and that defendant had committed the offense of domestic battery in the third degree. May v. State, 2009 Ark. App. 703, — S.W.3d — (2009).

Teacher's testimony alone was sufficient evidence of physical injury to support defendant juvenile's adjudication for second degree in violation of § 5-13-202 for striking the teacher in the arm because the teacher testified that after appellant hit her, the pain she suffered in her arm was of a sufficient nature to cause her to seek medical treatment, and she also testified that her arm was "very sore" for at least a week; while medical treatment is not required in order to establish a physical injury, the fact the pain was of a sufficient nature to cause the victim to seek medical care constitutes evidence that she experienced "substantial pain." M. T. v. State, 2009 Ark. App. 761, — S.W.3d — (2009).

Possess.

Evidence was sufficient to support defendant's conviction of possession of drug paraphernalia with intent to manufacture because the jury could reasonably conclude that defendant constructively possessed the paraphernalia with intent to manufacture where defendant owned the property jointly with his wife, defendant was the only person in the house when the police arrived, and defendant admitted to the officers that the methamphetamine lab in the home was his. Cantrell v. State, 2009 Ark. 456, — S.W.3d — (2009).

When a rape victim testified at defendant's probation revocation hearing that he had a gun at the time of the rape, that testimony was sufficient for the court to find that he had possessed a firearm within the meaning of § 5-73-103(a)(1) and subdivision (15) of this section. Craig v. State, 2010 Ark. App. 309, — S.W.3d — (2010).

Reasonable Belief.

Because a juvenile's father had not resorted to use of a deadly weapon during an argument, because there had been an interlude of approximately five minutes since their last confrontation, because the father, at the time he was struck, had turned away from the juvenile, and because the juvenile did not testify as to whether the juvenile's beliefs were reasonable, the juvenile lacked justification under subdivision (18) of this section and §§ 5-2-606(a)(1), 5-2-607(a)(1), (2), and was properly adjudicated as a delinquent for second-degree domestic battering. D.W. v. State, 2011 Ark. App. 187, — S.W.3d — (2011).

Serious Physical Injury.

Evidence was sufficient to show that defendant acted "under circumstances manifesting extreme indifference to the value of human life" and to sustain his conviction for first degree battery because defendant admittedly placed a child in a tub of water so hot that it severed the skin from his feet, and defendant's own statements, although inconsistent, supported the conclusion that he knew that it was his responsibility to properly supervise the child during a bath and to ensure a safe water temperature and that he consciously disregarded the risks involved. Bell v. State, 99 Ark. App. 300, 259 S.W.3d 472 (2007).

Where defendant stepped out of his motel room and fired a .45 caliber semiautomatic pistol through the windshield of a nearby car, striking all three occupants and killing two of them, the evidence was sufficient to support defendant's conviction of committing a terroristic act under § 5-13-310(a)(1)(A) and (B) as to the third victim because the evidence established that the third victim was shot in the foot, and the court rejected defendant's argument that the evidence was insufficient for failing to establish that the victim suffered a "serious physical injury" as that term is defined in subdivision (21) of this section. The evidence was sufficient to establish that the victim suffered a serious physical injury because the victim suffered a gunshot wound from a .45 caliber semiautomatic pistol that was serious enough to warrant emergency medical care, the victim continued to experience pain and tenderness while walking and was often unable to wear shoes due to the lasting effects of the wound, and the victim was unable to participate in activities that he enjoyed before sustaining the injury, such as playing basketball, and had visible scarring from the entry and exit of the bullet; this evidence was sufficient to support the jury's factual finding that the victim suffered a serious physical injury as a result of defendant's actions. Butler v.

State, 2009 Ark. App. 695, — S.W.3d — (2009).

Cited: Kale v. Ark. State Med. Bd., 367 Ark. 151, 238 S.W.3d 89 (2006); Autrand v. State, 2010 Ark. App. 245, — S.W.3d — (2010).

5-1-103. Applicability to offenses generally.

CASE NOTES

Cited: Ark. Dep't of Corr. v. Williams, 2009 Ark. 523, — S.W.3d — (2009).

5-1-104. Territorial applicability.

CASE NOTES

Jurisdiction.

Arkansas trial court had jurisdiction over defendant, a Georgia resident, during his trial for theft of property and computer fraud where defendant caused the victim, an Arkansas resident, to access her computer by virtue of his email correspondence for the purpose of obtaining money with a false or fraudulent intent, representation, or promise. Powell v. State, 97 Ark. App. 239, 246 S.W.3d 891 (2007).

5-1-107. Misdemeanors.

CASE NOTES

Jurisdiction.

According to the plain language of subsection (a) of this section, because a violation of any Arkansas Game and Fish Commission (AGFC) regulation carried a penalty that could include imprisonment but was not designated a felony, the act of violating an AGFC regulation was a misdemeanor; therefore, while the Bickerstaff case set forth a holding that the only penalty for violating the AGFC regulation was a fine, that was an incorrect statement of the law. State v. Herndon, 365 Ark. 185, 226 S.W.3d 771 (2006).

5-1-108. Violations.

CASE NOTES

Cited: State v. Herndon, 365 Ark. 185, 226 S.W.3d 771 (2006); Williams v. State, 2009 Ark. App. 554, — S.W.3d — (2009).

5-1-109. Statute of limitations.

(a)(1) A prosecution for murder may be commenced at any time.

(2) A prosecution may be commenced for a violation of the following offenses, if, when the alleged violation occurred, the offense was committed against a minor, the violation has not been previously reported to a law enforcement agency or prosecuting attorney, and the victim has not reached the age of twenty-eight (28) years of age:

(A) Rape, § 5-14-103;

(B) Sexual assault in the first degree, § 5-14-124;

(C) Sexual assault in the second degree, § 5-14-125;

(D) Sexual assault in the third degree, § 5-14-126;

(E) Sexual assault in the fourth degree, § 5-14-127;

(F) Incest, § 5-26-202;

(G) Endangering the welfare of a minor in the first degree, § 5-27-205;

(H) Permitting abuse of a minor, § 5-27-221;

(I) Engaging children in sexually explicit conduct for use in visual or print medium, § 5-27-303;

(J) Transportation of minors for prohibited sexual conduct, § 5-27-305;

(K) Employing or consenting to the use of a child in a sexual performance, § 5-27-402;

(L) Producing, directing, or promoting a sexual performance by a child, § 5-27-403;

(M) Computer child pornography, § 5-27-603; and

(N) Computer exploitation of a child in the first degree, § 5-27-605.

(b) Except as otherwise provided in this section, a prosecution for another offense shall be commenced within the following periods of limitation after the offense's commission:

(1)(A) Class Y felony or Class A felony, six (6) years.

(B) However, for rape, § 5-14-103, the period of limitation is eliminated if biological evidence of the alleged perpetrator is identified that is capable of producing a deoxyribonucleic acid (DNA) profile;

(2) Class B felony, Class C felony, Class D felony, or an unclassified felony, three (3) years;

(3) Misdemeanor or violation, one (1) year; and

(4) Municipal ordinance violation, one (1) year unless a different period of time not to exceed three (3) years is set by ordinance of the municipal government.

(c) If the period prescribed in subsection (b) of this section has expired, a prosecution may nevertheless be commenced for:

(1) Any offense involving either fraud or breach of a fiduciary obligation, within one (1) year after the offense is discovered or should reasonably have been discovered by an aggrieved party or by a person who has a legal duty to represent an aggrieved party and who is himself or herself not a party to the offense; and

(2)(A) Any offense that is concealed involving felonious conduct in office by a public servant at any time within five (5) years after he or she leaves public office or employment or within five (5) years after the offense is discovered or should reasonably have been discovered, whichever is sooner.

(B) However, in no event does this subdivision (c)(2) extend the period of limitation by more than ten (10) years after the commission of the offense.

(d) A defendant may be convicted of any offense included in the offense charged, notwithstanding that the period of limitation has

expired for the included offense, if as to the offense charged the period of limitation has not expired or there is no period of limitation, and there is sufficient evidence to sustain a conviction for the offense charged.

(e)(1) For the purposes of this section, an offense is committed either when:

(A) Every element occurs; or

(B) If a legislative purpose to prohibit a continuing course of conduct plainly appears, at the time the course of conduct or the defendant's complicity in the course of conduct is terminated.

(2) Time starts to run on the day after the offense is committed.

(f) A prosecution is commenced when an arrest warrant or other process is issued based on an indictment, information, or other charging instrument if the arrest warrant or other process is sought to be executed without unreasonable delay.

(g) The period of limitation does not run:

(1)(A) During any time when the accused is continually absent from the state or has no reasonably ascertainable place of abode or work within the state.

(B) However, in no event does this subdivision (g)(1) extend the period of limitation otherwise applicable by more than three (3) years; or

(2) During any period when a prosecution against the accused for the same conduct is pending in this state.

(h) If the period prescribed in subsection (b) of this section has expired, a prosecution may nevertheless be commenced for a violation of the following offenses if, when the alleged violation occurred, the offense was committed against a minor, the violation has not previously been reported to a law enforcement agency or prosecuting attorney, and the period prescribed in subsection (b) of this section has not expired since the victim has reached eighteen (18) years of age:

(1) Battery in the first degree, § 5-13-201;

(2) Battery in the second degree, § 5-13-202;

(3) Aggravated assault, § 5-13-204;

(4) Terroristic threatening in the first degree, § 5-13-301;

(5) Kidnapping, § 5-11-102;

(6) False imprisonment in the first degree, § 5-11-103;

(7) Permanent detention or restraint, § 5-11-106; and

(8) Criminal attempt, criminal solicitation, or criminal conspiracy to commit any offense listed in this subsection, §§ 5-3-201, 5-3-202, 5-3-301, and 5-3-401.

(i) If there is biological evidence connecting a person with the commission of an offense and that person's identity is unknown, the prosecution is commenced if an indictment or information is filed against the unknown person and the indictment contains the genetic information of the unknown person and the genetic information is accepted to be likely to be applicable only to the unknown person.

(j) When deoxyribonucleic acid (DNA) testing implicates a person previously identified through a search of the State DNA Data Base or

National DNA Index System, a statute of limitation shall not preclude prosecution of the offense.

History. Acts 1975, No. 280, § 104; 1981, No. 620, § 1; A.S.A. 1947, § 41-104; Acts 1987, No. 484, § 1; 1987, No. 586, § 1; 2001, No. 920, § 1; 2001, No. 1780, § 2; 2003, No. 1087, § 8; 2003, No. 1390, § 1; 2005, No. 2250, § 1; 2009, No. 1444, § 1; 2011, No. 698, § 1; 2011, No. 1127, §§ 1, 2.

Amendments. The 2009 amendment rewrote (b)(1)(B); substituted "§ 5-27-221" for "§ 5-27-221(a)(1) and (3)" in (h)(15); and rewrote (j).

The 2011 amendment by No. 698 inserted present (b)(4).

The 2011 amendment by No. 1127 added (a)(2); and deleted former (h)(8) through (h)(21) and redesignated the remaining subdivisions accordingly.

CASE NOTES

Analysis

Authority of Court.
Continuing Crime.
Evidence.

Authority of Court.

Inmate's appeal from the denial of his petition for a writ of habeas corpus was dismissed as the inmate could not state grounds on which to maintain his petition; appellate court rejected inmate's claim that the trial court did not have jurisdiction to charge him for the underlying conviction of rape of a person less than fourteen years old because inmate was charged within five years of the victim's 18th birthday and, therefore, was within the statute of limitations set forth in subdivisions (b)(1) and (h) of this section. Young v. Norris, 365 Ark. 219, 226 S.W.3d 797 (2006).

Continuing Crime.

Trial court did not err in denying defendant's motion to dismiss two charges for theft of property in excess of $2,500 on the ground that the charges were barred by the three-year statute of limitations in subdivision (b)(2) of this section because the amended information was filed within three years of the earliest unauthorized withdrawal from a client's account that was made by defendant, an attorney. Cameron v. State, 94 Ark. App. 58, 224 S.W.3d 559 (2006), appeal dismissed, — Ark. —, — S.W.3d —, 2007 Ark. LEXIS 496 (Sept. 27, 2007).

Trial court erred in denying a father's motion to dismiss a charge of failure to pay child support, a continuing offense, on the ground that the statute of limitations had expired because the date of the crime of nonsupport had to be determined based upon subdivision (b)(3) of this section, prior to its amendment in 1997; the one-year statute of limitations expired several weeks prior to the effective date of the amended version of the statute. Reeves v. State, 374 Ark. 415, 288 S.W.3d 577 (2008).

Prosecution for abuse of a corpse under § 5-60-101(a) was barred by the three-year statute of limitations under subdivision (b)(2) of this section because it was not a continuing-course-of-conduct crime; once defendant disposed of the body parts in a pond, she was no longer physically mistreating the corpse. McClanahan v. State, 2010 Ark. 39, — S.W.3d — (2010).

Evidence.

There was sufficient evidence that the sexual assault against one victim occurred in 2002 and, therefore, was within the three-year statute of limitations of subdivision (b)(2) of this section where the victim testified that defendant, a minister, assaulted her while she was working for the church during the summer of 2002. Talbert v. State, 367 Ark. 262, 239 S.W.3d 504 (2006).

Trial court did not err in denying defendant's motion to dismiss a rape charge based on failure to comply with the statute of limitations. Defendant's argument that the 2001 amendment to subdivision (b)(1)(B) of this section did not apply because there was no showing of an advancement in DNA testing failed. Walker v. State, 2010 Ark. App. 688, — S.W.3d — (2010).

5-1-110. Conduct constituting more than one offense — Prosecution.

(a) When the same conduct of a defendant may establish the commission of more than one (1) offense, the defendant may be prosecuted for each such offense. However, the defendant may not be convicted of more than one (1) offense if:

(1) One (1) offense is included in the other offense, as defined in subsection (b) of this section;

(2) One (1) offense consists only of a conspiracy, solicitation, or attempt to commit the other offense;

(3) Inconsistent findings of fact are required to establish the commission of the offenses;

(4) The offenses differ only in that one (1) offense is defined to prohibit a designated kind of conduct generally and the other offense to prohibit a specific instance of that conduct; or

(5) The conduct constitutes an offense defined as a continuing course of conduct and the defendant's course of conduct was uninterrupted, unless the law provides that a specific period of the course of conduct constitutes a separate offense.

(b) A defendant may be convicted of one (1) offense included in another offense with which he or she is charged. An offense is included in an offense charged if the offense:

(1) Is established by proof of the same or less than all of the elements required to establish the commission of the offense charged;

(2) Consists of an attempt to commit the offense charged or to commit an offense otherwise included within the offense charged; or

(3) Differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a lesser kind of culpable mental state suffices to establish the offense's commission.

(c) The court is not obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him or her of the included offense.

(d)(1) Notwithstanding any provision of law to the contrary, a separate conviction and sentence are authorized for:

(A) Capital murder, § 5-10-101, and any felony utilized as an underlying felony for the capital murder;

(B) Criminal attempt to commit capital murder, §§ 5-3-201 and 5-10-101, and any felony utilized as an underlying felony for the attempted capital murder;

(C) Murder in the first degree, § 5-10-102, and any felony utilized as an underlying felony for the murder in the first degree;

(D) Criminal attempt to commit murder in the first degree, §§ 5-3-201 and 5-10-102, and any felony utilized as an underlying felony for the attempted murder in the first degree; and

(E) Continuing criminal enterprise, § 5-64-405, and any predicate felony utilized to prove the continuing criminal enterprise.

(2) Pursuant to § 5-4-403, with respect to any offense mentioned in subdivision (d)(1) of this section, the trial judge may order that the multiple terms of imprisonment run concurrently or consecutively.

History. Acts 1975, No. 280, § 105; A.S.A. 1947, § 41-105; Acts 1995, No. 657, § 2; 2007, No. 670, § 1; 2009, No. 748, § 1.

Amendments. The 2007 amendment added (d)(1)(B) and (D) and redesignated the remaining subdivisions accordingly; inserted "§ 5-64-405 and" in present (d)(1)(E); and made minor punctuation and related changes.

The 2009 amendment deleted "and former § 5-64-414" following "§ 5-64-405" in (d)(1)(E).

RESEARCH REFERENCES

Ark. L. Rev. Article, Ethical and Effective Representation in Arkansas Capital Trials, 60 Ark. L. Rev. 1.

Recent Development: Arkansas Criminal Law — Felony Manslaughter as a Lesser-Included Offense, 60 Ark. L. Rev. 1017.

CASE NOTES

Analysis

Instructions.
Lesser Included Offenses.

Instructions.

In a first-degree battery case, a trial court did not err by refusing to give an instruction on second-degree battery because it was not a lesser included offense; both alternatives given in the proffered instruction required an additional element, serious physical injury, that was not required in the first-degree battery instruction that was given, which only required physical injury when the injury was caused by a firearm. Further, the proffered instruction was not a lesser-included offense because the offense was not an attempt offense, and the proffered instruction did not differ from the offense charged only in the respect that a less serious injury to the same person sufficed to establish the offense's commission. Spight v. State, 101 Ark. App. 400, 278 S.W.3d 599 (2008).

Circuit court did not abuse its discretion in denying defendant's second-degree battery instruction because the offense charged was first-degree battery pursuant to § 5-13-201(a)(3), and the jury was not required to find that defendant employed a firearm in order to convict him of that offense, nor was the jury required to apply the firearm enhancement if it convicted defendant of first-degree battery; the firearm enhancement was not an element of the first-degree-battery offense but was an additional sentence authorized by statute if defendant was convicted of first-degree battery, and the jury determined that defendant employed a firearm during commission of that offense. Reed v. State, 2011 Ark. App. 352, — S.W.3d — (2011).

Lesser Included Offenses.

Second-degree false imprisonment is not a lesser included offense of kidnapping; thus, instruction on second-degree or first-degree false imprisonment was not required in a kidnapping case. Davis v. State, 365 Ark. 634, 232 S.W.3d 476 (2006).

Circuit court erred in instructing the jury on felony manslaughter as a lesser included offense of capital felony murder, because the "extreme indifference" element was not a culpable mental state relating to a specific homicide victim but merely described the dangerous circumstances generally set in motion by defendant, and since the "extreme indifference" standard was not a mens rea related to a specific victim, it could not support a lesser included offense based on a less culpable mental state; the sole mens rea element in capital felony murder and first degree felony murder related to the underlying felony and not to the homicide itself. Perry v. State, 371 Ark. 170, 264 S.W.3d 498 (2007).

First-degree battery is not a lesser included offense of aggravated robbery as it

is not established by proof of the same or less than all of the elements required to prove aggravated robbery. First-degree battery requires proof of the use of a firearm, whereas aggravated robbery does not; aggravated robbery requires proof of a robbery, whereas first-degree battery does not. Clark v. State, 373 Ark. 161, 282 S.W.3d 801 (2008).

Prohibition against double jeopardy was not violated when defendant was convicted of first-degree battery and aggravated robbery because the elements of the offenses were not the same, and first-degree battery was not a lesser included offense of aggravated robbery. Clark v. State, 373 Ark. 161, 282 S.W.3d 801 (2008).

Neither § 5-64-401(c)(1) nor § 5-64-403(c)(1)(A)(i) are lesser included offenses of the other pursuant to the terms of subsection (b) of this section because the plain language shows that possession of a controlled substance does not require the simultaneous possession of paraphernalia, and possession of paraphernalia does not require the simultaneous possession of a controlled substance; the elements of the two offenses can be completely exclusive of each other. Koster v. State, 374 Ark. 74, 286 S.W.3d 152 (2008).

Trial court did not err during defendant's trial in refusing to instruct a jury on the lesser offense of sexual assault in the second degree, in violation of § 5-14-125(a)(3)(A)-(B), on one count of rape, in violation of § 5-14-103(a)(3)(A), because sexual assault was not established by proof of the same or less than all of the elements required to establish rape, as required by subsection (b) of this section to be a lesser-included offense. Joyner v. State, 2009 Ark. 168, 303 S.W.3d 54 (2009), cert. denied, Joyner v. Arkansas, — U.S. —, 130 S. Ct. 736, 175 L. Ed. 2d 514 (2009).

Trial court did not err in refusing to instruct the jury on aggravated assault during defendant's trial for aggravated robbery because aggravated assault, in violation of § 5-13-204(a)(1) and (2), was not a lesser-included offense of aggravated robbery pursuant to subdivision (b)(1) of this section as the two offenses required different elements of proof; aggravated assault required proof of circumstances manifesting extreme indifference to the value of human life, whereas aggravated robbery did not require such proof. Matthews v. State, 2009 Ark. 321, 319 S.W.3d 266 (2009).

In a case in which defendant was convicted of simultaneous possession of drugs and firearms and possession of a controlled substance with the intent to deliver and he argued that the latter conviction was a lesser-included offense of the simultaneous-possession charge and that his double-jeopardy rights had been violated because he had been convicted twice of the same crime, the latter conviction did not violate subdivision (a)(1) of this section. Under the Rowbottom decision, convictions for simultaneous possession of drugs and firearms and for possession with the intent to deliver did not violate double-jeopardy rules. Lee v. State, 2010 Ark. App. 224, — S.W.3d — (2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 289 (May 20, 2010).

Although there was not substantial evidence to support defendant's convictions for aggravated assault pursuant to § 5-13-204(a) with respect to defendant sideswiping a victim's vehicle on an interstate, under subsection (b) of this section, the evidence would clearly sustain convictions for the lesser-included offense of first degree assault under § 5-13-205(a); the testimony established defendant acted recklessly when he approached the victim's vehicle from the rear, going very fast, and in passing the victim's vehicle on the left, defendant sideswiped the vehicle. Mance v. State, 2010 Ark. App. 472, — S.W.3d — (2010).

Cited: Coombs v. Hot Springs Village Prop. Owners Ass'n, 98 Ark. App. 226, 254 S.W.3d 5 (2007).

5-1-111. Burden of proof — Defenses and affirmative defenses — Presumption.

RESEARCH REFERENCES

Ark. L. Rev. Article, Ethical and Effective Representation in Arkansas Capital Trials, 60 Ark. L. Rev. 1.

CASE NOTES

Analysis

Defenses.
Evidence.
Jurisdiction.

Defenses.

Because defendant presented evidence arguably supporting self defense or a justification defense to a charge of aggravated assault under Arkansas law, the government had to negate that defense by a preponderance of the evidence for an enhancement for using the firearm in connection with another felony offense under U.S. Sentencing Guidelines Manual § 2K2.1(b)(5) [now (b)(6)] (2005), to apply because whether circumstances negated defendant's excuse or justification was an element of the offense under § 5-1-102(5)(C), which had to be proved by the state under subdivision (a)(1) of this section, and the definition of aggravated assault expressly excluded any person acting in self-defense or the defense of a third party under § 5-13-204(c)(2). United States v. Raglin, 500 F.3d 675 (8th Cir. 2007).

Evidence.

There was sufficient evidence that the sexual assault against one victim occurred in 2002 and, therefore, was within the three-year statute of limitations of § 5-1-109(b)(2) where the victim testified that defendant, a minister, assaulted her while she was working for the church during the summer of 2002. Talbert v. State, 367 Ark. 262, 239 S.W.3d 504 (2006).

Jurisdiction.

Defendant's contention that the evidence was insufficient to prove that the murder took place in Arkansas was rejected as, although evidence showed that the victim's body was found in Oklahoma, and there was no positive evidence presented that the crime actually occurred outside of Arkansas; the record provided ample substantial evidence that, at the very least, the premeditation and deliberation element of capital murder and kidnapping by deception occurred in Arkansas. Smith v. State, 367 Ark. 274, 239 S.W.3d 494 (2006).

Fact that a victim was unable to provide details regarding the timing and location of the rape and the evidence that contradicted her testimony as to the location of the rapes was not positive evidence that the rape occurred outside the trial court's jurisdiction under this section; the victim's testimony that the rape occurred in Siloam Springs, Arkansas was substantial evidence that the trial court had jurisdiction. Strickland v. State, 2010 Ark. App. 599, — S.W.3d — (2010), rehearing denied, — Ark. App. —, — S.W.3d —, 2010 Ark. App. LEXIS 744 (Oct. 27, 2010).

5-1-112. Affirmative defense — Former prosecution for same offense.

CASE NOTES

Analysis

Acquittal.
Attachment of Jeopardy.
Mistrial.

Acquittal.

Fifth Amendment and Ark. Const. Art. 2, § 8's double jeopardy clauses did not bar defendant's retrial on capital-murder and first-degree murder charges because, although the jury forewoman announced in open court that the jury had found defendant not guilty on those charges, the jury had deadlocked on a manslaughter charge, a mistrial was declared, and there were no "findings" or "verdicts"; a trial court's declaration of a mistrial because of a hung jury was not an event that terminated the original jeopardy to which defendant was subjected, and the mere reading of the jury's verdict in open court did not constitute an acquittal. The statutory provision for what constitutes an acquittal in no way forecloses the requirement that for an acquittal to be final it must be entered of record. Blueford v. State, 2011 Ark. 8, — S.W.3d — (2011).

Attachment of Jeopardy.

At the beginning of defendant's rape trial, voir dire was conducted by both parties and a jury was selected but not sworn; due to a four-month delay in trial while the parties awaited the results from the crime lab, the circuit court ordered a mistrial. Because the jury had not been sworn under oath, double jeopardy did not attach under this section. Williams v. State, 371 Ark. 550, 268 S.W.3d 868 (2007).

Mistrial.

Trial court did not err by not allowing defendant to present evidence at his second trial concerning his affirmative defense of double jeopardy under this section, pursuant to which he would have presented evidence of the circumstances that resulted in the mistrial at his first trial, because doing so would allow a jury to usurp an appellate court's function of reviewing the mistrial by deciding whether there was an abuse of discretion as a question of fact, rather than requiring the issue to be reviewed on appeal as a matter of law. Koster v. State, 374 Ark. 74, 286 S.W.3d 152 (2008).

Mistrial was not justified when defense counsel's opening statement purportedly changed the theory of defense in a murder trial from self defense to accident; because the court could have taken corrective measures and proceeded with trial, the mistrial was unjustified, and any subsequent prosecution was prohibited. Shelton v. State, 2009 Ark. 388, 326 S.W.3d 429 (2009).

Denial of defendant's motions to bar his retrial on the charge of first-degree murder were proper because his trial ended in a mistrial without a final verdict entered in the record, and there was no actual verdict of acquittal under subdivision (1)(B)(i) of this section. Neither the transitional jury instruction nor the jury's written status report of the vote on the lesser-included charge negated the requirements for a formal verdict and there was no merit to defendant's arguments that the jury's note reflecting its vote on the lesser-included offense of second-degree murder constituted an implicit acquittal on the charge of first-degree murder, and that entry of the jury's note into the record rendered it controlling for the purpose of jeopardy on first degree. Basham v. State, 2011 Ark. App. 384, — S.W.3d — (2011).

5-1-113. Affirmative defense — Former prosecution for different offense.

RESEARCH REFERENCES

U. Ark. Little Rock. L. Rev. Annual Survey of Case Law, Criminal Law, 28 U. Ark. Little Rock L. Rev. 690.

CASE NOTES

Separate Offenses.

Where charges against defendant for alleging defrauding insurers were dismissed, this did not mandate a later dismissal of subsequently filed charges alleging Medicaid fraud under res judicata, issue preclusion, or § 5-1-113 because the crimes were not the same. Dilday v. State, 369 Ark. 1, 250 S.W.3d 217 (2007).

5-1-114. Affirmative defense — Former prosecution in another jurisdiction.

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Annual Survey of Case Law: Criminal Law, 29 U. Ark. Little Rock L. Rev. 849.

CASE NOTES

Prosecution for Same Conduct.

Defendant's acquittal of charges under 18 U.S.C.S. § 2423(a) in federal court did not operate as a bar to his statutory rape prosecution in state court as the underlying conduct upon which the federal conviction and Arkansas charge were based was not the same; a state jury's verdict that an act of statutory rape occurred in Arkansas would not necessarily be consistent with a federal jury's finding that, at the point in time when defendant transported the minor across state lines, he did not intend for the minor to engage in sexual activity. Winkle v. State, 366 Ark. 318, 235 S.W.3d 482 (2006).

CHAPTER 2

PRINCIPLES OF CRIMINAL LIABILITY

SUBCHAPTER.

Subchapter 2 — Culpability

5-2-202. Culpable mental states — Definitions.

RESEARCH REFERENCES

Ark. L. Rev. Article, Ethical and Effective Representation in Arkansas Capital Trials, 60 Ark. L. Rev. 1.

CASE NOTES

Analysis

Purpose.
Evidence.
Knowingly.
Negligently.
Purposely.
Recklessly.

Purpose.

Evidence was sufficient to sustain defendant's first degree murder conviction because defendant had a key to the victim's apartment, he admitted that he was at the apartment on the evening of the murder, defendant purchased drugs that night and told the seller that he had "busted a some-bitch's head," and defendant lied to the police during the investigation. Dunn v. State, 371 Ark. 140, 264 S.W.3d 504 (2007).

Defendant's conviction for first-degree terroristic threatening, pursuant to § 5-13-301(a)(1)(A), could not stand because there was no evidence, either direct or circumstantial, that it was defendant's conscious object—in keeping with subdivision (1) of this section—that his threatening statements, made to his girlfriend, be communicated to the victim, his former wife. Turner v. State, 2010 Ark. App. 214, — S.W.3d — (2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 258 (May 6, 2010).

Sufficient evidence established defendant had the necessary purposeful intent, as defined in subdivision (1) of this section, to commit aggravated assault in violation of § 5-13-204(a) with respect to a vehicular incident on a local road because the victim testified defendant stopped his car, put it in reverse, and rammed into the victim's vehicle enough times and with enough force to cause her vehicle to spin; the victim's testimony constituted substantial evidence that it was defendant's conscious object to engage in conduct that

created a substantial danger of death or serious physical injury to the victim and her infant son, who was also in the car. Mance v. State, 2010 Ark. App. 472, — S.W.3d — (2010).

Evidence.

Defendant's convictions were supported by substantial evidence where it was shown that (1) shortly after the incident, defendant had a blood-alcohol level of .23 percent, (2) defendant was driving the car that hit two women and narrowly missed a third, (3) just before the impact, defendant was witnessed to speed up and actually swerve the vehicle toward the women's path, and (4) defendant drove away after the impact. Estacuy v. State, 94 Ark. App. 183, 228 S.W.3d 567 (2006).

Evidence was sufficient to sustain defendant's kidnapping conviction as the 13 year old victim's mother relied upon the representation that defendant was taking the victim to the movies with his daughter when she gave permission for the victim to leave her home with defendant; the victim's mother did not consent to defendant escorting her daughter to a motel room under the guise of meeting someone briefly before meeting her daughter at the movies.Mitchem v. State, 96 Ark. App. 78, 238 S.W.3d 623 (2006).

Evidence was sufficient to sustain defendant's convictions for manslaughter because two people in a motor home were killed when defendant drove a fully loaded commercial vehicle weighing over 82,000 pounds, while under the influence of methamphetamine, into the oncoming-traffic lane, striking the motor home, and ultimately driving through it. Defendant never attempted to brake prior to the accident or to return to the proper lane of traffic. Hoyle v. State, 371 Ark. 495, 268 S.W.3d 313 (2007), rehearing denied, — Ark. —, — S.W.3d —, 2008 Ark. LEXIS 12 (Jan. 10, 2008).

Where defendant picked his ex-wife up from work, took her cell phone, started a verbal altercation, drove her to a bridge, stabbed her, threw her to the ground, and pushed her into the water, the evidence was sufficient to prove that defendant possessed the requisite state of mind under subdivision (1) of this section to support his conviction for attempted first-degree murder of his ex-wife. Jones v. State, 2009 Ark. App. 135, — S.W.3d — (2009).

Sufficient evidence supported the conclusion that a defendant intended to kill a victim: a witness testified that the witness gave defendant a gun, other witnesses testified that defendant shot the victim with that gun, defendant's girlfriend testified that while waiting for defendant in a car, the girlfriend heard two or three shots, and then defendant ran to the car, and inconsistent witness statements regarding whether the shooting occurred inside or outside the victim's apartment were not relevant to the conviction; therefore, defendant's motion for a directed verdict was properly denied. Hawkins v. State, 2009 Ark. App. 675, — S.W.3d — (2009).

Evidence supporting defendant's convictions for three counts of delivering a controlled substance in violation of § 5-64-401 was substantial because the jury had substantial, if not overwhelming, evidence from which to infer with reasonable certainty from the circumstances that defendant formed the necessary criminal intent to sell a confidential informant crack cocaine; a captain of the police department testified that his office received multiple calls indicating that defendant was engaged in selling controlled substances, and evidence was presented that on three occasions the confidential informant assisted the police in making controlled buys of crack cocaine from defendant and that the substances the confidential informant purchased from defendant tested positive for crack cocaine. Edwards v. State, 2010 Ark. App. 59, — S.W.3d — (2010).

Trial court did not err by denying defendant's motions for a directed verdict because substantial evidence supported his conviction, as there was evidence that: (1) defendant had prior knowledge of his wife's affair with the victim and investigated the victim's background; (2) defendant waited in his truck after arriving at the store until the victim and his wife were standing by their vehicles; and (3) defendant fired multiple shots, chased the victim, and stood over him to deliver a final shot to the head. James v. State, 2010 Ark. 486, — S.W.3d — (2010).

Knowingly.

Defendant's conviction for battery in the second degree was appropriate under §§ 5-13-202(a)(4)(C) and 5-2-202(2) be-

cause the evidence was clear that defendant intended to restrain the victim. The victim, defendant's mother-in-law, testified that defendant grabbed her, threw her into a chair, and pushed her down anytime the victim had tried to stand up. LaFort v. State, 98 Ark. App. 202, 254 S.W.3d 27 (2007).

Where defendant took a loaded gun from his vehicle after seeing the victim's group outside a department store and deliberately shot the victim three times at close range, the jury could infer that he knowingly caused the victim's death for purposes of subdivision (2)(A) and (B) of this section; the trial court did not abuse its discretion by admitting defendant's statement that he shot the victim, because he wanted to give him an early Christmas present. The statement was probative of defendant's state of mind as well as his lack of remorse; because the evidence was sufficient to support defendant's conviction for second degree murder in violation of § 5-10-103(a)(1), the trial court did not err by denying his motion for a directed verdict. Vorachith v. State, 2009 Ark. App. 656, — S.W.3d — (2009).

Appellants' convictions for theft of property were affirmed because substantial evidence supported the convictions where (1) while appellants maintained they were simply running a business and made some poor business decisions, the testimony of the victims established a pattern of taking and exercising unauthorized control over the victims' money with the purpose of depriving the victims of their money; (2) the pattern demonstrated that appellants sold items to the victims, accepted the victims' money, purposefully and knowingly delayed delivery of the merchandise, and offered multiple and most often untrue excuses for why the orders did not arrive; and (3) the evidence showed that appellants would tell customers that an item was in shipping, was shipped in the wrong color, back ordered, or damaged in shipping. Williams v. State, 2009 Ark. App. 848, — S.W.3d — (2009).

Defendant's conviction for murder in the second degree, with a firearm enhancement, was proper because defendant acted knowingly to cause the victim's death under circumstances manifesting extreme indifference to the value of human life, as described in subdivision (2) of this section. The issues involved credibility and it was presumed that a person intended the natural and probable consequences of his or her acts; defendant shot her husband in the wrist with a handgun, he bled to death as a result of the wound, and additional evidence indicated that the fatal wound was defensive in nature. Johnson v. State, 2010 Ark. App. 153, — S.W.3d — (2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 257 (May 6, 2010).

Negligently.

In defendant's trial for criminally negligent homicide, the trial court erred in failing to grant defendant's motion for directed verdict where the state's evidence that defendant's truck merely crossed the center line of a road was insufficient to support a finding of criminal negligence; this was a different standard from the evidence needed to support a finding of civil negligence. Utley v. State, 93 Ark. App. 381, 219 S.W.3d 709 (2005), rev'd, 366 Ark. 514, 237 S.W.3d 27 (2006).

Evidence was sufficient to support defendant's conviction of negligent homicide where the jury could conclude that defendant's failure to perceive the risk under the facts constituted a gross deviation from the standard of care that a reasonable person would observe in defendant's position. Utley v. State, 366 Ark. 514, 237 S.W.3d 27 (2006).

Appellants' convictions for negligent homicide in the death of their daughter were affirmed; given the record—which included appellants allowing three hours to pass without checking on or knowing the whereabouts of their twenty-two-month-old child—the instant court could not say that the verdicts were not supported by substantial evidence. Marin v. State, 2009 Ark. App. 802, — S.W.3d — (2009).

Purposely.

Evidence was sufficient to sustain defendant's forgery and theft convictions where she did not offer a reasonable explanation of how she acquired the forged check; therefore, an inference that she committed the forgery or was an accessory to its commission was warranted and the court did not err in inferring defendant's intent. DeShazer v. State, 94 Ark. App. 363, 230 S.W.3d 285 (2006).

There was sufficient evidence for the jury to determine that defendant had the

requisite mens rea for first-degree murder at the time he shot and killed his wife as an expert for the state testified that defendant did not have a mental disease or defect at the time of the shooting; the jury was entitled to believe the state's expert over defendant's expert. Davis v. State, 368 Ark. 401, 246 S.W.3d 862 (2007).

Circuit court did not err by admitting into evidence photographs of the murder victim because her wounds were relevant to show defendant's intent to kill her; they also assisted the jury in understanding the crime-scene investigator's description of the scene, and the circuit court performed a proper evaluation of the photographs before allowing them to be presented to the jury. Davis v. State, 368 Ark. 401, 246 S.W.3d 862 (2007).

Evidence was sufficient to sustain a first degree murder conviction because defendant admitted to hitting, kicking, and stabbing the victim, a knife blade was found at the crime scene, and a matching handle was later found at defendant's house, and defendant's statement to the investigating officer indicated that his conscious object was to cause the death of the victim. Navarro v. State, 371 Ark. 179, 264 S.W.3d 530 (2007).

Evidence was sufficient to show that defendant acted "under circumstances manifesting extreme indifference to the value of human life" and to sustain his conviction for first degree battery because defendant admittedly placed a child in a tub of water so hot that it severed the skin from his feet, and defendant's own statements, although inconsistent, supported the conclusion that he knew that it was his responsibility to properly supervise the child during a bath and to ensure a safe water temperature and that he consciously disregarded the risks involved. Bell v. State, 99 Ark. App. 300, 259 S.W.3d 472 (2007).

Evidence was sufficient to support a conviction for first-degree battery under § 5-13-201(a)(8) where defendant purposely fired three times at an occupied truck on a highway; a passenger was struck and seriously injured. There was a presumption that defendant intended the natural and probable consequences of his actions. Spight v. State, 101 Ark. App. 400, 278 S.W.3d 599 (2008).

Defendant's conviction for theft of property lost, mislaid, or mistakenly delivered was supported by the evidence because defendant failed to take reasonable measures to return a double payment made to defendant's business on behalf of a customer, and acted with purposeful intent under subdivision (1) of this section of depriving the victims. Cora v. State, 2009 Ark. App. 431, 319 S.W.3d 281 (2009).

Evidence was sufficient to support defendant's conviction of first-degree murder for the killing of a romantic rival and to establish the requisite intent of purposefulness because it showed that defendant, while possessing a knife, drove to the victim's residence, confronted her, and stabbed her with the knife in the ensuing altercation. Mooney v. State, 2009 Ark. App. 622, 331 S.W.3d 588 (2009), review denied, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 820 (Dec. 10, 2009).

Trial court did not err in refusing to direct the verdicts where defendant took actions to conceal the harm to the child, and failed to take action to secure appropriate care for the child; the jury could conclude that defendant rubbing a substance known to cause skin irritation on the face of a toddler where Superglue had already adhered would cause, at the very least, the impairment of physical condition or a visible mark associated with the physical trauma. Price v. State, 2009 Ark. App. 664, — S.W.3d — (2009).

Defendant's conviction for first-degree criminal mischief under § 5-38-203(a)(1) was supported by substantial evidence as: (1) it was fair to presume that defendant purposely for purposes of subdivision (1) of this section broke a former supervisor's car windows when defendant repeatedly swung a long, heavy metal object at them; (2) defendant's statement to the supervisor immediately prior to smashing the supervisor's windows that defendant should "kick (the supervisor's) ass" demonstrated defendant's anger and indicated a desire to express that anger with violence; and (3) defendant failed to support a claim that defendant's actions were justified. Warren v. State, 2011 Ark. App. 102, — S.W.3d — (2011).

Defendant's conviction for domestic battering under § 5-26-304(a)(2) was supported by sufficient evidence because the state showed that, with the purpose of causing physical injury, defendant caused injury to the victim, his brother, by means of a deadly weapon. While defendant con-

tended that he was acting in self-defense when he struck the victim with a sickle, the testimony of the victim and the victim's brother established that the victim did not have the gun that he had when police arrived until after defendant had battered both the victim and the victim's brother. Brown v. State, 2011 Ark. App. 150, — S.W.3d — (2011).

State failed to show that a juvenile engaged in disorderly conduct in a reckless or purposeful manner as those terms were defined by this section, as the juvenile's behavior in unexpectedly coming upon a scene in which the juvenile's mother was being arrested was not a gross deviation from a reasonable standard of care. M.J. v. State, 2011 Ark. App. 171, — S.W.3d — (2011), rehearing denied, — Ark. App. —, — S.W.3d —, 2011 Ark. App. LEXIS 300 (Apr. 13, 2011).

Recklessly.

Evidence was sufficient to show that defendant acted recklessly as to her son's abuse where she was confronted by her sister-in-law regarding concerns that defendant's son was being abused and defendant did nothing to prevent future abuse. Graham v. State, 365 Ark. 274, 229 S.W.3d 30 (2006).

Defendant's convictions for manslaughter, in violation of § 5-10-104(a)(3), were modified to the lesser-included offense of negligent homicide under § 5-10-105(b)(1) because defendant's acts of crossing the center line, tailgating, and averting defendant's eyes from the road constituted negligence, not recklessness under subdivision (3) of this section. Rollins v. State, 2009 Ark. App. 110, 302 S.W.3d 617 (2009), rev'd, 2009 Ark. 484, — S.W.3d — (2009).

State produced evidence in the form of a witness that defendant pushed the victim from a moving vehicle and that he struck her afterwards as she lay on the ground; by pushing the victim from a moving vehicle and then kicking her, defendant consciously disregarded the risk that his actions would cause injury to the victim, and there was substantial evidence to support a finding that defendant recklessly caused physical injury to the victim. Lasker v. State, 2009 Ark. App. 591, — S.W.3d — (2009).

Evidence supported the inference that defendant juvenile intended to engage in the conduct of hitting a nurse and threatening her and a doctor's lives to create public inconvenience, annoyance, or alarm in violation of § 5-71-207 because the nurse testified that defendant attacked her on several different occasions, and defendant did not argue that he was in any way incapable of controlling his actions at the time he threatened to kill either the nurse or the doctor and struck the nurse; at the very least, defendant consciously disregarded the effects of his actions. M. T. v. State, 2009 Ark. App. 761, — S.W.3d — (2009).

State failed to show that a juvenile engaged in disorderly conduct in a reckless or purposeful manner as those terms were defined by this section, as the juvenile's behavior in unexpectedly coming upon a scene in which the juvenile's mother was being arrested was not a gross deviation from a reasonable standard of care. M.J. v. State, 2011 Ark. App. 171, — S.W.3d — (2011), rehearing denied, — Ark. App. —, — S.W.3d —, 2011 Ark. App. LEXIS 300 (Apr. 13, 2011).

Cited: Henson v. State, 94 Ark. App. 163, 227 S.W.3d 450 (2006); MacKool v. State, 365 Ark. 416, 231 S.W.3d 676 (2006); Bell v. State, 371 Ark. 375, 266 S.W.3d 696 (2007); Law v. State, 375 Ark. 505, 292 S.W.3d 277 (2009); Jackson v. State, 2009 Ark. 336, 321 S.W.3d 260 (2009); Moseby v. State, 2010 Ark. App. 5, — S.W.3d — (2010); Lee v. State, 2010 Ark. App. 15, — S.W.3d — (2010); Freeman v. State, 2010 Ark. App. 90, — S.W.3d — (2010); Banks v. State, 2011 Ark. App. 249, — S.W.3d — (2011).

5-2-203. Culpable mental states — Interpretation of statutes.

RESEARCH REFERENCES

Ark. L. Rev. Article, Ethical and Effective Representation in Arkansas Capital Trials, 60 Ark. L. Rev. 1.

CASE NOTES

Cited: Edwards v. State, 2010 Ark. App. 59, — S.W.3d — (2010).

5-2-204. Elements of culpability — Exceptions to culpable mental state requirement.

RESEARCH REFERENCES

Ark. L. Rev. Article, Ethical and Effective Representation in Arkansas Capital Trials, 60 Ark. L. Rev. 1.

CASE NOTES

Mental State Irrelevent.

Because the failure to register as a sex offender was a strict liability offense under § 12-12-901 et seq. and the state proved that defendant was required to register but failed to do so, the trial court did not err by denying defendant's motion for a directed verdict. Adkins v. State, 371 Ark. 159, 264 S.W.3d 523 (2007).

Cited: Henson v. State, 94 Ark. App. 163, 227 S.W.3d 450 (2006).

5-2-205. Causation.

CASE NOTES

Evidence.

Trial court did not err by denying defendant's motion for a directed verdict on the capital murder charge because: (1) but for defendant's aggravated robbery, speeding, and fleeing from the police, the trooper would not have been in the roadway attempting to retrieve stop sticks and would not have been struck by another trooper's vehicle; (2) the state presented sufficient evidence that defendant acted under circumstances manifesting an extreme indifference to the value of human life, as it showed that defendant robbed the victim with a gun, fled with his accomplice and the loot in a stolen car on a busy interstate, and initiated a high-speed chase while being pursued by several law enforcement officers with their lights and sirens blaring, thereby engaging in life-threatening activity; and (3) the phrase "under circumstances manifesting extreme indifference to the value of human life" was not void for vagueness, as the cases interpreting the phrase provided fair warning that it involved a life-threatening activity. Jefferson v. State, 372 Ark. 307, 276 S.W.3d 214 (2008).

5-2-206. Ignorance or mistake.

RESEARCH REFERENCES

Ark. L. Rev. Article, Ethical and Effective Representation in Arkansas Capital Trials, 60 Ark. L. Rev. 1.

CASE NOTES

Cited: Jester v. State, 367 Ark. 249, 239 S.W.3d 484 (2006).

5-2-207. Intoxication.

RESEARCH REFERENCES

Ark. L. Rev. Article, Ethical and Effective Representation in Arkansas Capital Trials, 60 Ark. L. Rev. 1.

5-2-208. Duress.

RESEARCH REFERENCES

Ark. L. Rev. Article, Ethical and Effective Representation in Arkansas Capital Trials, 60 Ark. L. Rev. 1.

5-2-209. Entrapment.

RESEARCH REFERENCES

Ark. L. Rev. Article, Ethical and Effective Representation in Arkansas Capital Trials, 60 Ark. L. Rev. 1.

CASE NOTES

ANALYSIS

Admission of Crime.
Elements of Defense.

Admission of Crime.

Trial court did not err in evoking defendant's suspended sentence on the ground that he committed the offense of possession of drug paraphernalia with the intent to manufacture methamphetamine in violation of § 5-64-403(c)(5) because the evidence showed that a reliable source had tipped off the police to the fact that defendant, contrary to the terms and conditions of his release, was continuing to manufacture methamphetamine, and defendant directed the purchases and provided an explanation for each component of the methamphetamine recipe; it was shown that defendant conceived and proposed the methamphetamine cook, buy, and sell arrangement for the manufacture and distribution of the illegal substance, and simply by asserting the defense of entrapment under this section, defendant necessarily admitted committing the offense. Lowe v. State, 2010 Ark. App. 284, — S.W.3d — (2010).

Elements of Defense.

Circuit court did not err in rejecting criminal defendant's proffered instruction on the defense of entrapment where codefendant waived the defense prior to trial. Montgomery v. State, 367 Ark. 485, 241 S.W.3d 753 (2006).

SUBCHAPTER 3 — MENTAL DISEASE OR DEFECT

SECTION.
5-2-326. Restraint of an Arkansas State Hospital patient.

Effective Dates. Acts 2007, No. 463, § 6: July 1, 2007. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that federal law prohibits the sale of firearms to persons who have been committed to a mental institution; that it is the intent of this act to require the submission of information to create a confidential database that may only be used for firearm sales or transactions; and that this act is necessary because possession of a firearm by a person that is suicidal, homicidal, or gravely disabled poses an critical threat of harm to the citizens of this state. Therefore, an emergency is declared to exist and this act being necessary for the preservation of the public peace, health, and safety shall become effective on July 1, 2007."

Acts 2007, No. 623, § 2: Mar. 28, 2007. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the present procedure for revocation of conditional release orders is inadequate to protect the public; that this act is necessary to clarify and refute the Original Commentary regarding § 5-2-316(b); and that this act is necessary to assure continued treatment for those persons who cannot or will not maintain appropriate treatment and who have previously shown the capacity to commit felonies. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

5-2-301. Definitions.

As used in this subchapter:

(1) "Appropriate facility" means any facility within or without this state to which a defendant is eligible for admission and treatment for mental disease or defect;

(2) "Capacity of the defendant to have the culpable mental state" means a defendant's ability to have the culpable mental state necessary to establish an element of the offense charged, as defined in § 5-2-202;

(3) "Compliance monitor" means either a social service representative or licensed social worker, or both, employed by the Department of Human Services for the purpose of, including, but not limited to:

(A) Verifying that a person conditionally released pursuant to a provision of this subchapter is in compliance with the conditions for release;

(B) Providing social service assistance to a person conditionally released pursuant to a provision of this subchapter; and

(C) Reporting compliance with the conditions for release or lack of compliance with the conditions for release to the appropriate circuit court;

(4) "Designated receiving facility or program" means an inpatient or outpatient treatment facility or program that is designated within each

geographic area of the state by the Director of the Division of Behavioral Health of the Department of Human Services to accept the responsibility for the care, custody, and treatment of a person involuntarily admitted to the state mental health system;

(5)(A) "Mental disease or defect" means a:

(i) Substantial disorder of thought, mood, perception, orientation, or memory that grossly impairs judgment, behavior, capacity to recognize reality, or ability to meet the ordinary demands of life;

(ii) State of significantly subaverage general intellectual functioning existing concurrently with a defect of adaptive behavior that developed during the developmental period; or

(iii) Significant impairment in cognitive functioning acquired as a direct consequence of a brain injury.

(B) As used in the Arkansas Criminal Code, "mental disease or defect" does not include an abnormality manifested only by:

(i) Repeated criminal or otherwise antisocial conduct;

(ii) Continuous or noncontinuous periods of intoxication, as defined in § 5-2-207(b)(1), caused by a substance such as alcohol or a drug; or

(iii) Dependence upon or addiction to any substance such as alcohol or a drug;

(6) "Prescribed regimen of medical, psychiatric, or psychological care or treatment" means to care or treatment for a mental illness, as defined in § 20-47-202;

(7) "Qualified psychiatrist" means a licensed psychiatrist who has successfully completed either a post-residency fellowship in forensic psychiatry accredited by the American Board of Psychiatry and Neurology or a forensic certification course approved by the department, and who is currently approved by the department to administer a forensic examination as defined in this subchapter;

(8) "Qualified psychologist" means a licensed psychologist who has received a post-doctoral diploma in forensic psychology accredited by the American Board of Professional Psychology or successfully completed a forensic certification course approved by the department, and who is currently approved by the department to administer a forensic examination as defined in this subchapter;

(9)(A) "Restraint" means any manual method, physical or mechanical device, material, or equipment that immobilizes a person or reduces the ability of a person to move his or her arms, legs, body, or head freely.

(B) "Restraint" does not include devices such as orthopedically prescribed devices, surgical dressings or bandages, protective helmets, or other methods that involve the physical holding of a person for the purpose of protecting the person from falling or to permit the person to participate in activities without the risk of physical harm to himself or herself; and

(10) "State mental health system" means the Arkansas State Hospital and any other facility or program certified by the Division of Behavioral Health of the Department of Human Services.

History. Acts 1975, No. 280, § 616; A.S.A. 1947, § 41-616; Acts 1995, No. 767, § 1; 1997, No. 922, § 1; 2001, No. 1554, § 1; 2007, No. 636, § 1.

Amendments. The 2007 amendment inserted present (9), redesignated the following subdivision accordingly, and made related changes.

RESEARCH REFERENCES

Ark. L. Rev. Article, Ethical and Effective Representation in Arkansas Capital Trials, 60 Ark. L. Rev. 1.

5-2-302. Lack of fitness to proceed generally.

CASE NOTES

Competency.

Where doctor determined that defendant demonstrated a fully-developed, persecutory-type delusion, the court suspended defendant's trial for attempting to commit capital murder and did not proceed until his fitness was restored; at that time, two doctors testified that defendant did not lack the capacity to understand the proceedings against him and to assist effectively in his own defense. Steward v. State, 95 Ark. App. 6, 233 S.W.3d 180 (2006).

Determination of defendant's capacity was supported by credible testimony of a qualified medical expert that defendant, despite some mental illness, understood the proceedings sufficiently to assist counsel in defendant's defense. Bayless v. State, 2010 Ark. App. 456, — S.W.3d — (2010).

Cited: Smith v. State, 2011 Ark. App. 104, — S.W.3d — (2011).

5-2-303. Admissibility of evidence to show mental state.

CASE NOTES

Instructions.

Trial court properly refused to instruct the jury on defendant's mental state because the requested instruction was a modified version of the model instructions and the jury had been instructed regarding the state's burden of proof and the elements of first-degree murder and lesser offenses so that the instruction was effectively given. Ross v. State, 96 Ark. App. 385, 242 S.W.3d 298 (2006).

5-2-305. Mental health examination of defendant.

(a)(1) Subject to the provisions of §§ 5-2-304 and 5-2-311, the court shall immediately suspend any further proceedings in a prosecution if:

(A) A defendant charged in circuit court files notice that he or she intends to rely upon the defense of mental disease or defect;

(B) There is reason to believe that the mental disease or defect of the defendant will or has become an issue in the cause;

(C) A defendant charged in circuit court files notice that he or she will put in issue his or her fitness to proceed; or

(D) There is reason to doubt the defendant's fitness to proceed.

(2)(A) If a trial jury has been impaneled, the court may retain the jury or declare a mistrial and discharge the jury.

(B) A discharge of the trial jury is not a bar to further prosecution.

(b)(1) Upon suspension of further proceedings in the prosecution, the court shall enter an order:

(A) Directing that the defendant undergo examination and observation by one (1) or more qualified psychiatrists or qualified psychologists;

(B) Appointing one (1) or more qualified psychiatrists not practicing within the Arkansas State Hospital to make an examination and report on the mental condition of the defendant; or

(C) Directing the Director of the Division of Behavioral Health of the Department of Human Services to determine who will examine and report upon the mental condition of the defendant.

(2) The Director of the Division of Behavioral Health of the Department of Human Services or his or her designee shall determine the location of the forensic examination.

(3) The forensic examination shall be for a period not exceeding thirty (30) days or such longer period as the Director of the Division of Behavioral Health of the Department of Human Services or his or her designee determines to be necessary for the purpose of the forensic examination.

(4)(A)(i) A uniform evaluation order shall be developed by the Administrative Office of the Courts, the office of the Prosecutor Coordinator, and the Department of Human Services.

(ii) At a minimum the uniform evaluation order shall contain the:

(a) Defendant's name, age, gender, and race;

(b) Charges pending against the defendant;

(c) Defendant's attorney's name and address;

(d) Defendant's custody status;

(e) Case number; and

(f) Case number and a unique identifying number on the incident reporting form as required by the Arkansas Crime Information Center.

(iii) The uniform evaluation order shall be utilized any time that a defendant is ordered to be examined by the court pursuant to this section and a copy of the uniform evaluation order shall be forwarded to the Director of the Department of Human Services or his or her designee.

(iv) No forensic examination shall be conducted without using the uniform evaluation order.

(B)(i) The Division of Behavioral Health of the Department of Human Services shall maintain a database of all examinations of defendants performed pursuant to this chapter.

(ii)*(a)* At a minimum the database shall contain the information on the uniform evaluation order as provided in subdivision (b)(4)(A)(ii) of this section.

(b) Additionally, the database shall track insanity acquittees and their conditional release.

(c) Upon completion of a forensic examination pursuant to subsection (b) of this section, the court may enter an order providing for

further examination and may order the defendant committed to the Arkansas State Hospital or other appropriate facility for further examination and observation if the court determines that commitment and further examination and observation are warranted.

(d)(1) A report of a forensic examination shall include the following:

(A) A description of the nature of the forensic examination;

(B) A substantiated diagnosis in the terminology of the American Psychiatric Association's current edition of the Diagnostic and Statistical Manual;

(C) An opinion on whether the defendant lacks the capacity to understand the proceedings against him or her and to assist effectively in his or her own defense as a consequence of mental disease or defect;

(D) A description of any evidence that the defendant is feigning a sign or symptom of mental disease or defect;

(E)(i) An opinion as to whether the defendant has the capacity to understand the proceedings against him or her and to assist effectively in his or her own defense.

(ii) If the opinion under subdivision (d)(1)(E)(i) of this section is that the defendant has the capacity to understand the proceedings and to effectively assist in his or her own defense, then the examiner shall further examine the defendant and include in the report of the forensic examination an opinion as to the extent, if any, to which the capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was impaired at the time of the conduct alleged.

(iii) An opinion under subdivision (d)(1)(E)(i) or (d)(1)(E)(ii) of this section shall also include a description of the reasoning used by the examiner to support the opinion; and

(F)(i) When directed by the court, an opinion as to the capacity of the defendant to have the culpable mental state that is required to establish an element of the offense charged.

(ii) An opinion under subdivision (d)(1)(F)(i) of this section shall also include a description of the reasoning used by the examiner to support the opinion.

(2) In addition to the information required in subdivision (d)(1) of this section, the report of the forensic examination shall include a separate explanation of:

(A) The sign or symptom of mental disease or defect that led to the opinion on the presence of mental disease or defect; and

(B) The evidence that supports the opinion of the examiner on the capacity of the defendant to understand the proceedings against him or her and the defendant's capacity to assist in his or her own defense.

(e) If a forensic examination cannot be conducted because of the unwillingness of the defendant to participate in the forensic examination, the report of the forensic examination shall so state and shall include, if possible, an opinion as to whether the unwillingness of the defendant is the result of mental disease or defect.

(f)(1) A person designated to perform a forensic examination shall file the report of the forensic examination with the clerk of the court, and the clerk of the court shall mail a copy to the defense attorney and a copy to the prosecuting attorney.

(2) Upon entry of an order by a circuit court, a copy of the report of the forensic examination concerning a defendant shall be provided to the circuit court by the person designated to perform the forensic examination.

(g)(1) Notwithstanding the provision of any statute enacted prior to January 1, 1976, any existing medical or pertinent record in the custody of a public agency shall be made available to the examiner and counsel for inspection and copying.

(2) The court shall require the prosecuting attorney to provide to the examiner any information relevant to the forensic examination, including, but not limited to:

(A) The name and address of any attorney involved in the matter;

(B) Information about the alleged offense; and

(C) Any information about the defendant's background that is deemed relevant to the forensic examination, including the criminal history of the defendant.

(3) The court may require the attorney for the defendant to provide any available information relevant to the forensic examination, including, but not limited to, a:

(A) Psychiatric record;

(B) Medical record; or

(C) Record pertaining to treatment of the defendant for substance or alcohol abuse.

(h)(1) When a forensic examination of a defendant has been completed, the county from which the defendant had been sent for the forensic examination shall procure the defendant within three (3) working days from the Arkansas State Hospital or from a designated receiving facility or program or other facility where the forensic examination was performed.

(2) If the county fails to procure the defendant within this three-day period, the county shall bear any room or board costs on the fourth and subsequent days.

(i) A person under commitment and supervision of the Department of Correction who is a defendant charged in circuit court shall not undergo an examination or observation conducted by a psychiatrist or other mental health employee of the Department of Correction to determine the mental condition of the defendant.

(j)(1) A person or entity that provides treatment under this subchapter may impose a charge for the cost of the treatment.

(2) A charge for costs under subdivision (j)(1) of this section may not exceed the actual cost of the treatment.

(3)(A) The Division of Behavioral Health of the Department of Human Services shall promulgate rules establishing reasonable charges for costs of treatment under this subchapter.

(B) Rules establishing reasonable charges for costs of treatment under this subchapter shall:

(i) Provide for postponing the collection of the charges based on clinical considerations or the patient's inability to pay, or both; and

(ii) Waive charges for treatment of defendants who plead guilty or nolo contendere or are found guilty at trial.

History. Acts 1975, No. 280, § 605; 1977, No. 360, § 2; 1979, No. 886, § 1; 1983, No. 191, § 3; A.S.A. 1947, § 41-605; Acts 1989, No. 645, §§ 5, 6; 1989, No. 898, § 1; 1989, No. 911, §§ 5, 6; 1995, No. 767, § 3; 2001, No. 1554, § 3; 2011, No. 991, §§ 1, 2, 3.

Amendments. The 2011 amendment rewrote (d)(1)(E); deleted former (h)(1) and (h)(2)(A) and redesignated the remaining subdivisions accordingly; and added (j).

CASE NOTES

Analysis

Mental Fitness at Issue.
Request or Motion for Examination.

Mental Fitness at Issue.

Trial court did not err in denying defendant's request for a mental evaluation where there was no evidence to suggest that he lacked an appreciation for the seriousness of the charges against him or an ability to assist his attorney in his defense, and the trial court found him fit to proceed. Bryant v. State, 94 Ark. App. 387, 231 S.W.3d 91 (2006).

Pursuant to defense counsel's motion, the court suspended defendant's trial for a mental-health evaluation and a doctor determined that defendant demonstrated a fully-developed, persecutory-type delusion; however, once defendant's fitness was restored, his prosecution for attempting to commit capital murder could proceed and the court was not required to order a second evaluation when defendant later claimed he was hearing voices. Steward v. State, 95 Ark. App. 6, 233 S.W.3d 180 (2006).

Request or Motion for Examination.

In a rape case, requests for a continuance under Ark. R. Crim. P. 27.3 and for the appointment of additional experts were properly denied because a court-ordered mental evaluation complied with subsection (d) of this section, defendant had several months to secure a deoxyribonucleic acid expert, and it was unlikely that he could have procured an alibi witness. Creed v. State, 372 Ark. 221, 273 S.W.3d 494 (2008), rehearing denied, — Ark. —, — S.W.3d —, 2008 Ark. LEXIS 157 (Mar. 6, 2008), cert. denied, Creed v. State, — U.S. —, 129 S. Ct. 130, 172 L. Ed. 2d 37 (2008).

Trial court's denial of defendant's request for a mental-health evaluation was proper because the appellate court was faced with only a secondhand count of defendant's mental state, no explanation for the delay in filing the motion, and the knowledge that defense counsel had needed more time due to scheduling conflicts. Holden v. State, 104 Ark. App. 5, 289 S.W.3d 125 (2008), review denied, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 501 (Jan. 30, 2009).

Cited: Jimenez v. State, 2010 Ark. App. 805, — S.W.3d — (2010).

5-2-309. Determination of fitness to proceed.

CASE NOTES

Analysis

Duty to Decide Fitness.
Hearing.

Duty to Decide Fitness.

Although defendant raised the issue of his lack of capacity at the time of the alleged offenses due to mental disease or defect, as well as the issue of his mental retardation for purposes of applying the death penalty, these were two issues separate and distinct from the issue of capacity

to stand trial. Because defendant's competency to stand trial was never in dispute, and because defendant acknowledged his competency at trial, the trial court did not err in failing to rule on defendant's competency. Miller v. State, 2010 Ark. 1, — S.W.3d — (2010), rehearing denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 95 (Feb. 12, 2010).

Hearing.

Trial court was not obligated to hold a hearing on the issue of competency to stand trial where two mental evaluations concluded that defendant was fit to stand trial and was not impaired by mental defect, and the findings were not contested by either party. Weston v. State, 366 Ark. 265, 234 S.W.3d 848 (2006).

5-2-310. Lack of fitness to proceed — Procedures subsequent to finding.

(a)(1)(A) If the court determines that a defendant lacks fitness to proceed, the proceeding against him or her shall be suspended and the court may commit the defendant to the custody of the Department of Human Services for detention, care, and treatment until restoration of fitness to proceed.

(B) However, if the court is satisfied that the defendant may be released without danger to himself or herself or to the person or property of another, the court may order the defendant's release and the release shall continue at the discretion of the court on conditions the court determines necessary.

(2) A copy of the report filed pursuant to § 5-2-305 shall be attached to the order of commitment or order of conditional release.

(b)(1) Within a reasonable period of time, but in any case within ten (10) months of a commitment pursuant to subsection (a) of this section, the department shall file with the committing court a written report indicating whether the defendant is fit to proceed, or if not, whether:

(A) The defendant's mental disease or defect is of a nature precluding restoration of fitness to proceed; and

(B) The defendant presents a danger to himself or herself or to the person or property of another.

(2)(A) The court shall make a determination within one (1) year of a commitment pursuant to subsection (a) of this section.

(B) Pursuant to the report of the department or as a result of a hearing on the report, if the court determines that the defendant is fit to proceed, prosecution in ordinary course may commence.

(C) If the defendant lacks fitness to proceed but does not present a danger to himself or herself or to the person or property of another, the court may release the defendant on conditions the court determines to be proper.

(D) If the defendant lacks fitness to proceed and presents a danger to himself or herself or the person or property of another, the court shall order the department to petition for an involuntary admission.

(E) Upon filing of an order finding that the defendant lacks fitness to proceed issued under subdivision (b)(2)(A) of this section with a circuit clerk or a probate clerk, the circuit clerk or the probate clerk shall submit a copy of the order to the Arkansas Crime Information Center.

(c)(1) On the court's own motion or upon application of the department, the prosecuting attorney, or the defendant, and after a hearing if a hearing is requested, if the court determines that the defendant has regained fitness to proceed, the criminal proceeding shall be resumed.

(2) However, if the court is of the view that so much time has elapsed since the alleged commission of the offense in question that it would be unjust to resume the criminal proceeding, the court may dismiss the charge.

History. Acts 1975, No. 280, § 607; A.S.A. 1947, § 41-607; Acts 1989, No. 645, § 1; No. 911, § 1; 2007, No. 463, § 1; No. 568, § 1.

Amendments. The 2007 amendment by No. 463 added (b)(1)(E).

The 2007 amendment by No. 568 deleted "Director of the" preceding "Department" in (a)(1)(A); substituted "department" for "director or his or her designee" in (b)(1) and (b)(2)(B); and substituted "department" for "director" in (b)(2)(D) and (c)(1).

CASE NOTES

Analysis

Length of Detention.
Suspension of Proceedings.

Length of Detention.

Where a pretrial detainee who suffered from acute psychosis died after he was returned to jail because there was no available hospital bed, his right to be free from deliberate indifference on the part of the county sheriffs was not violated as the detention at issue was less than five days. Winters v. Ark. HHS, 437 F. Supp. 2d 851 (E.D. Ark. 2006), aff'd, 491 F.3d 933, 2007 U.S. App. LEXIS 15486 (8th Cir. Ark. 2007).

Suspension of Proceedings.

Where doctor determined that defendant demonstrated a fully-developed, persecutory-type delusion, the court suspended defendant's trial for attempting to commit capital murder, however, the proceedings commenced when two doctors testified that defendant did not lack the capacity to understand the proceedings against him and to assist effectively in his own defense; further, an additional mental-health evaluation was not warranted when defendant later claimed he was hearing voices. Steward v. State, 95 Ark. App. 6, 233 S.W.3d 180 (2006).

5-2-312. Lack of capacity — Affirmative defense.

RESEARCH REFERENCES

Ark. L. Rev. Article, Ethical and Effective Representation in Arkansas Capital Trials, 60 Ark. L. Rev. 1.

CASE NOTES

Analysis

Applicability.
Burden of Proof.
Mental Disease or Defect.

Applicability.

Although defendant raised the issue of his lack of capacity at the time of the alleged offenses due to mental disease or defect, as well as the issue of his mental

retardation for purposes of applying the death penalty, these were two issues separate and distinct from the issue of capacity to stand trial. Because defendant's competency to stand trial was never in dispute, and because defendant acknowledged his competency at trial, the trial court did not err in failing to rule on defendant's competency. Miller v. State, 2010 Ark. 1, — S.W.3d — (2010), rehearing denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 95 (Feb. 12, 2010).

Burden of Proof.

In a murder case, defendant failed to prove his defense of mental disease or defect because the state's expert testified that defendant showed no signs of significant cognitive impairment or active psychiatric disease. She diagnosed defendant with alcohol dependence and marijuana dependence, neither of which constituted a mental disease. Navarro v. State, 371 Ark. 179, 264 S.W.3d 530 (2007).

Mental Disease or Defect.

In a prosecution for capital murder, as defendant failed to move for a directed verdict on the basis of the affirmative defense of mental disease or defect, that issue was not preserved for review. Marcyniuk v. State, 2010 Ark. 257, — S.W.3d — (2010), rehearing denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 402 (Aug. 6, 2010).

5-2-313. Acquittal based on mental health report.

CASE NOTES

Civil Commitment.

By entering a plea of not guilty by reason of mental disease or defect, defendant conceded that he engaged in the conduct charged; because he availed himself of the procedure afforded under § 5-2-313, defendant's due-process rights were not violated. Ark. Dep't of Corr. v. Bailey, 368 Ark. 518, 247 S.W.3d 851 (2007).

5-2-314. Acquittal — Examination of defendant — Hearing.

(a) When a defendant is acquitted on the ground of mental disease or defect, a circuit court is required to determine and to include the determination in the order of acquittal one (1) of the following:

(1) The offense involved bodily injury to another person or serious damage to the property of another person or involved a substantial risk of bodily injury to another person or serious damage to the property of another person, and that the defendant remains affected by mental disease or defect;

(2) The offense involved bodily injury to another person or serious damage to the property of another person or involved a substantial risk of bodily injury to another person or serious damage to the property of another person, and that the defendant is no longer affected by mental disease or defect;

(3) The offense did not involve bodily injury to another person or serious damage to the property of another person nor did it involve substantial risk of bodily injury to another person or serious damage to the property of another person, and that the defendant remains affected by mental disease or defect; or

(4) The offense did not involve bodily injury to another person or serious damage to the property of another person nor did it involve a substantial risk of bodily injury to another person or serious damage to the property of another person, and that the defendant is no longer affected by mental disease or defect.

(b)(1) If the circuit court enters a determination based on subdivision (a)(1) or (3) of this section, the circuit court shall order the defendant committed to the custody of the Department of Human Services for an examination by a psychiatrist or a licensed psychologist.

(2) Upon filing of an order of commitment under subdivision (b)(1) of this section with a circuit clerk, the circuit clerk shall submit a copy of the order to the Arkansas Crime Information Center.

(c) If the circuit court enters a determination based on subdivision (a)(2) or (4) of this section, the circuit court shall immediately discharge the defendant.

(d)(1)(A) The department shall file the psychiatric or psychological report with the probate clerk of the circuit court having venue within thirty (30) days following receipt of an order of acquittal.

(B) If before thirty (30) days the department makes application to the circuit court for an extension of time to file the psychiatric or psychological report and the circuit court finds there is good cause for the delay, the circuit court may order that additional time be allowed for the department to file the psychiatric or psychological report.

(C) A hearing shall be conducted by the circuit court and shall take place not later than ten (10) days following the filing of the psychiatric or psychological report with the circuit court.

(2) If the psychiatric or psychological report is not filed within thirty (30) days following the department's receipt of an order of acquittal or within such additional time as authorized by the circuit court, the circuit court may grant a petition for a writ of habeas corpus ordering the release of the defendant under terms and conditions that are reasonable and just for the defendant and societal concerns about the safety of persons and property of others.

(e)(1) A person found not guilty on the ground of mental disease or defect of an offense involving bodily injury to another person or serious damage to the property of another person or involving a substantial risk of bodily injury to another person or serious damage to the property of another person has the burden of proving by clear and convincing evidence that his or her release would not create a substantial risk of bodily injury to another person or serious damage to property of another person due to a present mental disease or defect.

(2) With respect to any other offense, the person has the burden of proof by a preponderance of the evidence.

(f)(1) A person acquitted whose mental condition is the subject of a hearing has a right to counsel.

(2)(A) If it appears to the circuit court that the person acquitted is in need of counsel, an attorney shall be appointed immediately upon filing of the original petition.

(B)(i) When an attorney is appointed by the circuit court, the circuit court shall determine the amount of the fee to be paid the attorney appointed by the circuit court and issue an order of payment.

(ii) The amount of the fee allowed shall be based upon the time and effort of the attorney in the investigation, preparation, and representation of the client at the court hearings.

(g)(1) The quorum court of each county shall appropriate funds for the purpose of payment of the attorney's fees provided for by subsection (f) of this section.

(2) Upon presentment of a claim accompanied by an order of the circuit court fixing the fee, the claim shall be approved by the county court and paid in the same manner as other claims against the county are paid.

(h) A hearing conducted pursuant to subsection (d) of this section may be held at the Arkansas State Hospital or a designated receiving facility or program where the person acquitted is detained.

(i) When conducting any hearing set out in this section, the circuit judge may conduct the hearing within any county of his or her judicial district.

(j)(1)(A) It is the duty of the prosecuting attorney's office in the county where the petition is filed to represent the State of Arkansas at any hearing held pursuant to this section except a hearing pending at the Arkansas State Hospital in Pulaski County.

(B) A prosecuting attorney may contract with another attorney to provide services under subdivision (j)(1) of this section.

(2) The office of the Prosecutor Coordinator shall appear for and on behalf of the State of Arkansas at the Arkansas State Hospital in Little Rock.

(3) Representation under this subsection is a part of the official duties of a prosecuting attorney or the office of the Prosecutor Coordinator and the prosecuting attorney or the office of the Prosecutor Coordinator is immune from civil liability in the performance of this official duty.

History. Acts 1989, No. 645, § 3; No. 821, § 1; No. 911, § 3; 1995, No. 609, § 1; 2003, No. 1185, § 3; 2005, No. 1446, § 1; 2007, No. 463, § 2; No. 568, § 3.

Amendments. The 2007 amendment by No. 463 added (b)(2).

The 2007 amendment by No. 568 deleted "Director of the" preceding "Department" in (b); substituted "department" for "director" in (d)(1)(A) and twice in (d)(1)(B); and substituted "department's" for "director's" in (d)(2).

RESEARCH REFERENCES

ALR. Extended Commitment of One Committed to Institution as Consequence of Acquittal of Crime on Ground of Insanity. 52 A.L.R.6th 567.

5-2-315. Discharge or conditional release.

(a)(1)(A) When the Director of the Department of Human Services or his or her designee determines that a person acquitted has recovered from his or her mental disease or defect to such an extent that his or her release or his or her conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment

would no longer create a substantial risk of bodily injury to another person or serious damage to the property of another person, the director shall promptly file an application for discharge or conditional release of the person acquitted with the circuit court that ordered the commitment.

(B) In addition, if the person acquitted has an impairment due to alcohol or substance abuse, the director may petition the circuit court for involuntary commitment under § 20-64-815.

(2) The director shall send a copy of the application to the counsel for the person acquitted and to the attorney for the state.

(b)(1) Within twenty (20) days after receiving the application for discharge or conditional release of the person acquitted, the attorney for the state may petition the circuit court for a hearing to determine whether the person acquitted should be released.

(2) If the attorney for the state does not request a hearing, the circuit court may conduct a hearing on its own motion or discharge the person acquitted.

(c) If the circuit court finds after a hearing under subsection (b) of this section by the standard specified in § 5-2-314(e) that the person acquitted has recovered from his or her mental disease or defect to such an extent that:

(1) The discharge of the person acquitted would no longer create a substantial risk of bodily injury to another person or serious damage to property of another person, then the circuit court shall order that the person acquitted be immediately discharged; or

(2) The conditional release of the person acquitted under a prescribed regimen of medical, psychiatric, or psychological care or treatment would no longer create a substantial risk of bodily injury to another person or serious damage to property of another person, then the circuit court shall order:

(A) That the person acquitted be conditionally released under a prescribed regimen of medical, psychiatric, or psychological care or treatment that has been:

(i) Prepared for the person acquitted;

(ii) Certified to the circuit court as appropriate by the director of the facility in which the person acquitted is committed; and

(iii) Found by the circuit court to be appropriate; and

(B) Explicit conditions of release, including without limitation requirements that:

(i) The person acquitted comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment;

(ii) The person acquitted be subject to regularly scheduled personal contact with a compliance monitor for the purpose of verifying compliance with the conditions of release;

(iii) Compliance with the conditions of release be documented with the circuit court by the compliance monitor at ninety-day intervals or at such intervals as the circuit court may order; and

(iv) Impose the conditions of release for a period of up to five (5) years.

(d) If the circuit court determines that the person acquitted has not met his or her burden of proof under subsection (c) of this section, the person acquitted shall continue to be committed to the custody of the Department of Human Services.

(e) A person ordered to be in charge of a prescribed regimen of medical, psychiatric, or psychological care or treatment of a person acquitted shall provide:

(1) The prescribed regimen of medical, psychiatric, or psychological care or treatment;

(2) Periodic written documentation to a compliance monitor of compliance with the conditions of release, including, but not limited to, documentation of compliance with the prescribed:

(A) Medication;

(B) Treatment and therapy;

(C) Substance abuse treatment; and

(D) Drug testing; and

(3)(A) Written notice of any failure of the person acquitted to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment to the:

(i) Compliance monitor;

(ii) Attorney for the person acquitted;

(iii) Attorney for the state; and

(iv) Circuit court having jurisdiction.

(B) The written notice under subdivision (e)(3)(A) of this section shall be provided immediately upon the failure of the person acquitted to comply with a condition of release.

(C)(i) Upon the written notice under subdivision (e)(3)(A) of this section or upon other probable cause to believe that the person acquitted has failed to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, the person acquitted may be detained and shall be taken without unnecessary delay before the circuit court having jurisdiction over him or her.

(ii) After a hearing, the circuit court shall determine whether the person acquitted should be remanded to an appropriate facility on the ground that, in light of his or her failure to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, his or her continued release would create a substantial risk of bodily injury to another person or serious damage to property of another person.

(D) At any time after a hearing employing the same criteria, the circuit court may modify or eliminate the prescribed regimen of medical, psychiatric, or psychological care or treatment.

(f)(1) Regardless of whether the director or his or her designee has filed an application pursuant to a provision of subsection (a) of this section, and at any time during the commitment of the person acquitted, a person acquitted, his or her counsel, or his or her legal guardian may file with the circuit court that ordered the commitment a motion for a hearing to determine whether the person acquitted should be discharged from the facility in which the person acquitted is committed.

(2) However, no motion under subdivision (f)(1) of this section may be filed more than one (1) time every one hundred eighty (180) days.

(3) A copy of the motion under subdivision (f)(1) of this section shall be sent to the:

(A) Director of the facility in which the person acquitted is committed; and

(B) Attorney for the state.

History. Acts 1989, No. 645, § 4; 1989, No. 911, § 4; 1995, No. 609, § 2; 1995, No. 767, § 4; 1997, No. 922, § 2; 2011, No. 990, § 1.

Amendments. The 2011 amendment inserted "including without limitation requirements" in (c)(2)(B); and added (c)(2)(B)(iv).

5-2-316. Conditional release — Subsequent discharge, modification, or revocation.

(a)(1) The Director of the Department of Human Services or his or her designee, or a person conditionally released under § 5-2-315, or both, may apply to the court ordering the conditional release for discharge from or modification of the order granting conditional release on the ground that he or she may be discharged or the order modified without danger to himself or herself or to the person or property of another person.

(2) The application shall be accompanied by a supporting affidavit of a qualified physician.

(3) A copy of the application and affidavit shall be transmitted to the prosecuting attorney of the judicial circuit from which the person was conditionally released and to any person supervising his or her release, and the hearing on the application shall be held following notice to the prosecuting attorney and the person supervising his or her release.

(b)(1) After notice to the conditionally released person and a hearing, the court may determine that the conditionally released person has violated a condition of release or that for the safety of the conditionally released person or for the safety of the person or property of another person the conditional release should be modified, extended for a period specified by the court not to exceed five (5) years, or revoked.

(2)(A) If an order is entered revoking the most recent order of conditional release under subdivision (b)(1) of this section, all conditions of the release shall be abated, and the person shall be ordered to be committed to the custody of the director or the director's designee.

(B) After the revocation described in subdivision (b)(2)(A) of this section, the person is subject to future discharge or conditional release only under the procedure prescribed in § 5-2-315.

History. Acts 1975, No. 280, § 614; A.S.A. 1947, § 41-614; Acts 1997, No. 922, § 3; 2007, No. 623, § 1; 2011, No. 990, § 2.

Amendments. The 2007 amendment rewrote (b).

The 2011 amendment, in (a)(1), substituted "the director of the Department of

Human Services or his or her designee, or a" for "any" and "under § 5-2-314, or both" for "pursuant to § 5-2-314 or § 5-2-315"; in (b)(1), deleted "within five (5) years after the most recent order of conditional release is issued pursuant to § 5-2-314 or § 5-2-315 and" preceding "after notice," inserted "person" following "another," and substituted "modified, extended for a period specified by the court not to exceed five (5) years, or revoked" for "modified or revoked"; in (b)(2)(A), deleted "including the five-year conditional release time frame in subdivision (b)(1) of this section" following "abated" and "of the Department of Human Services" following "director"; and inserted "conditional" in (b)(2)(B).

CASE NOTES

Jurisdiction.

Circuit court did not lack jurisdiction in 2006 to consider a petition for the conditional release of a state hospital patient who had been the subject of an initial conditional-release order in 1993 because this section, even prior to clarifying amendments made in 2007, could not properly be read as automatically depriving the court of jurisdiction 5 years after an initial order. State v. Owens, 370 Ark. 421, 260 S.W.3d 288 (2007).

5-2-326. Restraint of an Arkansas State Hospital patient.

(a) If necessary for security, an Arkansas State Hospital patient shall be physically restrained with a restraint while being transported to locations away from hospital grounds or to and from any court appearance.

(b) A patient shall not be physically restrained with a restraint if the restraint is medically contraindicated.

(c) The restraint shall be implemented in accordance with safe and appropriate restraint techniques as determined by hospital policy.

(d) The restraint used shall be the least restrictive type or technique necessary to effectively protect the patient, staff members, or others from harm.

(e) The restraint shall not be used as a means of coercion, discipline, convenience, or retaliation by staff.

History. Acts 2007, No. 636, § 2.

Subchapter 4 — Parties to Offenses

5-2-401. Criminal liability generally.

CASE NOTES

Analysis

Application.
Evidence.
Participation.

Application.

Defendant's conviction for capital murder, in violation of § 5-10-101(a)(4), was proper because there was substantial evidence that defendant was guilty as an accomplice pursuant to this section and §§ 5-2-402(2) and 5-2-403(b)(1), (2), and his argument that there was insufficient evidence of his acting as an accomplice by encouraging, aiding, or assisting the killer in stabbing the victim, was not preserved for review. Lawshea v. State, 2009 Ark. 600, — S.W.3d — (2009).

Evidence.

Defendant's conviction for capital murder was supported by substantial evidence where he served as an accomplice to

the murder by directing his brother to "come on down" from the attic because the victim moved, suggesting that his brother needed to finish killing the victim, which he did while defendant watched. Wilson v. State, 365 Ark. 664, 232 S.W.3d 455 (2006).

Participation.

Under accomplice liability, a person may commit an offense by his own conduct or by that of another person. Wilson v. State, 365 Ark. 664, 232 S.W.3d 455 (2006).

5-2-402. Liability for conduct of another generally.

CASE NOTES

Analysis

Accomplices.
Evidence.

Accomplices.

Person is criminally liable for the conduct of another person when he is the accomplice of another person in the commission of an offense. Wilson v. State, 365 Ark. 664, 232 S.W.3d 455 (2006).

Defendant's conviction for capital murder, in violation of § 5-10-101(a)(4), was proper because there was substantial evidence that defendant was guilty as an accomplice pursuant to §§ 5-2-401, 5-2-403(b)(1), (2), and subdivision (2) of this section, and his argument that there was insufficient evidence of his acting as an accomplice by encouraging, aiding, or assisting the killer in stabbing the victim, was not preserved for review. Lawshea v. State, 2009 Ark. 600, — S.W.3d — (2009).

Substantial evidence supported defendant's convictions for aggravated robbery, kidnapping, aggravated assault, theft of property, unlawful discharge of a firearm from a vehicle, and fleeing because while the state did not prove that defendant actually entered a bank, it did provide substantial evidence that he was the driver of the getaway car and thus was an accomplice of the two men who committed the aggravated robbery, kidnapping, and theft of property; while defendant did not personally shoot at an officer's vehicle, his conduct of driving the fleeing vehicle while another person in the car fired the shots sufficiently implicated him as an accomplice to unlawfully discharging a firearm from a vehicle. Barber v. State, 2010 Ark. App. 210, — S.W.3d — (2010).

Evidence.

Evidence was sufficient to convict defendant of first degree murder and theft where, in addition to the testimony of defendant's wife, who was an accomplice, defendant's own statements to the police, his conduct before and after the crime, and statements of the victim's friends regarding her fear of defendant tended to connect him to the crimes; further, although there was no evidence that defendant ever drove victim's Cadillac or had the vehicle in his possession, the jury might have determined that defendant facilitated the theft by leaving the accomplice without a vehicle at the victim's house, and there was evidence that the theft of the Cadillac was part of the plan to murder the victim. MacKool v. State, 365 Ark. 416, 231 S.W.3d 676 (2006).

Defendant's conviction for capital murder was supported by substantial evidence where he served as an accomplice to the murder by directing his brother to "come on down" from the attic because the victim moved, suggesting that his brother needed to finish killing the victim, which he did while defendant watched. Wilson v. State, 365 Ark. 664, 232 S.W.3d 455 (2006).

Defendant's convictions for two counts of aggravated robbery were proper because a neighbor verified that one of the intruders had a gun; the victim told officers that the intruders hid their guns in the closet, where two guns were found; and both intruders were charged in the same instrument, implicating accomplice liability, under subdivision (2) of this section. That provided substantial evidence to support the finding that the intruders at minimum represented by word or conduct that they were armed as a threat in order to commit the theft. Hinton v. State, 2010 Ark. App. 341, — S.W.3d — (2010), rehearing denied, — Ark. App. —, — S.W.3d —, 2010 Ark. App. LEXIS 516 (June 2, 2010), review denied, — Ark. —,

— S.W.3d —, 2010 Ark. LEXIS 399 (Aug. 6, 2010).

Defendant's convictions for two counts of aggravated burglary were proper because defendant's argument that there was no direct proof on the record of defendant holding a gun was without merit since substantial circumstantial evidence supported a finding of guilt, either as a principal or an accomplice, as defined in subdivision (2) of this section. A neighbor verified that one of the intruders had a gun, the victim told the officers that the intruders hid their guns in the closet, where two guns were found, and both intruders were charged in the same instrument, implicating accomplice liability; that provided substantial evidence supporting the finding that the intruders at minimum represented by word or conduct that they were armed as a threat. Hinton v. State, 2010 Ark. App. 341, — S.W.3d — (2010), rehearing denied, — Ark. App. —, — S.W.3d —, 2010 Ark. App. LEXIS 516 (June 2, 2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 399 (Aug. 6, 2010).

Defendant's convictions for breaking or entering, in violation of § 5-39-202(1), and theft of property, in violation of § 5-36-103(a)(1), were supported by the evidence because defendant's unlawful presence near a storage shed, flight from the victim, and association with persons involved in the crimes suggested that defendant jointly participated in the crimes under subdivision (a)(2) of this section. Goforth v. State, 2010 Ark. App. 735, — S.W.3d — (2010).

Trial court did not err in denying defendant's motion for a directed verdict during a trial for first-degree murder as an accomplice, in violation of subsection (2) of this section, because a codefendant testified that defendant hired the codefendant to murder his wife; the state presented the testimony of five witnesses concerning the fear of defendant's wife that he would kill her. Camp v. State, 2011 Ark. 155, — S.W.3d — (2011).

Cited: Ramsey v. State, 2010 Ark. App. 836, — S.W.3d — (2010).

5-2-403. Accomplices.

CASE NOTES

Analysis

Accomplice Testimony.
Evidence.
Instructions.
Liability.
Testimony.

Accomplice Testimony.

Where defendant's friend testified that defendant tried to rob the victim in his truck and shot him when he resisted, defendant's fingerprints were found on the truck and the blood on the gun matched defendant's DNA. Even if the friend was deemed an accomplice for purposes of this section, the evidence was sufficient to connect defendant to the offense. Bush v. State, 374 Ark. 506, 288 S.W.3d 658 (2008).

Evidence.

Defendant's conviction for theft by receiving was proper as the evidence established that his companion was in the store where the victim worked around the time that her credit card was stolen, defendant presented that credit card at a gas station a short time later, and defendant and his companion tried to purchase over $100 in merchandise; the state provided sufficient evidence to prove that defendant was at least an accomplice in the crime. Henson v. State, 94 Ark. App. 163, 227 S.W.3d 450 (2006).

Evidence was sufficient to convict defendant of first degree murder and theft where, in addition to the testimony of defendant's wife, who was an accomplice, defendant's own statements to the police, his conduct before and after the crime, and statements of the victim's friends regarding her fear of defendant tended to connect him to the crimes; further, although there was no evidence that defendant ever drove victim's Cadillac or had the vehicle in his possession, the jury might have determined that defendant facilitated the theft by leaving the accomplice without a vehicle at the victim's house, and there was evidence that the theft of the Cadillac was part of the plan

to murder the victim. MacKool v. State, 365 Ark. 416, 231 S.W.3d 676 (2006).

Defendant's conviction for capital murder was supported by substantial evidence where he served as an accomplice to the murder by directing his brother to "come on down" from the attic because the victim moved, suggesting that his brother needed to finish killing the victim, which he did while defendant watched. Wilson v. State, 365 Ark. 664, 232 S.W.3d 455 (2006).

There was sufficient evidence to support a residential burglary conviction under § 5-39-201 based on defendant's act of helping to remove, transport, and sell stolen items, even though he did not enter a residence himself. Therefore, a motion for a directed verdict was properly denied. Hickman v. State, 99 Ark. App. 363, 260 S.W.3d 747 (2007), rev'd, 372 Ark. 438, 277 S.W.3d 217 (2008).

Pursuant to subsection (b) of this section, the state presented sufficient evidence of premeditation and deliberation: the evidence presented at trial showed that defendant was aware that several individuals desired that the victim be killed; that the killer who stabbed the victim approached defendant on at least three occasions about joining him in committing the killing; that despite his close relationship with the victim, defendant never warned her of any danger; that on the day of the murder, the killer announced to defendant they were going to "make this money"; that defendant rode with the killer and two other individuals to the victim's home; that defendant gained entry to the victim's home; and that defendant was present in the bedroom where the victim's body was found. In addition, defendant fled to Cleveland, Ohio after the crime. Lawshea v. State, 2009 Ark. 600, — S.W.3d — (2009).

Substantial evidence supported defendant's convictions for aggravated robbery, kidnapping, aggravated assault, theft of property, unlawful discharge of a firearm from a vehicle, and fleeing because while the state did not prove that defendant actually entered a bank, it did provide substantial evidence that he was the driver of the getaway car and thus was an accomplice of the two men who committed the aggravated robbery, kidnapping, and theft of property; while defendant did not personally shoot at an officer's vehicle, his conduct of driving the fleeing vehicle while another person in the car fired the shots sufficiently implicated him as an accomplice to unlawfully discharging a firearm from a vehicle. Barber v. State, 2010 Ark. App. 210, — S.W.3d — (2010).

State presented sufficient evidence to show that defendant was an accomplice to his traveling companion's crime of robbing a bank because defendant was in proximity of the crime, he had the opportunity to help the companion get away from the bank, and he associated with the companion both immediately before and immediately after the companion robbed the bank; defendant and the companion were traveling together for at least three weeks before the bank robbery, they arrived at the bank separately, defendant left the parking lot as the companion exited the vehicle to rob the bank, and he picked the companion up off the premises. Grissom v. State, 2010 Ark. App. 504, — S.W.3d — (2010).

Defendant's convictions for breaking or entering, in violation of § 5-39-202(1), and theft of property, in violation of § 5-36-103(a)(1), were supported by the evidence because defendant's unlawful presence near a storage shed, flight from the victim, and association with persons involved in the crimes suggested that defendant jointly participated in the crimes under subdivision (b)(2) of this section. Goforth v. State, 2010 Ark. App. 735, — S.W.3d — (2010).

Sufficient evidence supported defendant's convictions as an accomplice, as defined in this section, to aggravated robbery and theft of property because defendant was present during the crime, the state established a substantial association between defendant and codefendant, and, based on those linking facts, it was reasonable for the jury to conclude that defendant assisted her codefendant by finding the victim, setting up a meeting, leading the victim to a remote location, assuring the victim would have a substantial amount of cash, moving to the backseat of the car during the robbery, and by encouraging the victim to give codefendant the cash. Ramsey v. State, 2010 Ark. App. 836, — S.W.3d — (2010).

Trial court did not err in denying defendant's motion for a directed verdict during a trial for first-degree murder as an accomplice, in violation of § 5-10-102(a)(2)

and subdivision (a)(1) of this section, because a codefendant testified that defendant hired the codefendant to murder his wife; the state presented the testimony of five witnesses concerning the fear of defendant's wife that he would kill her. Camp v. State, 2011 Ark. 155, — S.W.3d — (2011).

Instructions.

Although there was sufficient evidence to support a burglary conviction, a trial court committed reversible error when it failed to give a disputed accomplice jury instruction; the evidence showed that a witness in the case did more than just acquiesce to the burglary and fail to notify police. Specifically, the witness accompanied defendant and an associate when they left the scene of the crime; the witness knew that the stolen merchandise was transported in defendant's van; the witness accepted a stolen check from the associate; he was present when the stolen merchandise was sold; and he did not reveal the information to authorities until he was arrested for using the stolen check. Hickman v. State, 99 Ark. App. 363, 260 S.W.3d 747 (2007), rev'd, 372 Ark. 438, 277 S.W.3d 217 (2008).

Liability.

When two people assist one another in the commission of a crime, each is an accomplice and criminally liable for the conduct of both; one cannot disclaim accomplice liability simply because he did not personally take part in every act that went to make up the crime as a whole. Henson v. State, 94 Ark. App. 163, 227 S.W.3d 450 (2006).

Defendant's conviction for capital murder, in violation of § 5-10-101(a)(4), was proper because there was substantial evidence that defendant was guilty as an accomplice pursuant to §§ 5-2-401, 5-2-402(2) and subdivisions (b)(1) and (2) of this section, and his argument that there was insufficient evidence of his acting as an accomplice by encouraging, aiding, or assisting the killer in stabbing the victim, was not preserved for review. Lawshea v. State, 2009 Ark. 600, — S.W.3d — (2009).

Testimony.

Defendant's convictions for capital murder and kidnapping were appropriate because a witness' testimony alone was enough to corroborate an accomplice's testimony against defendant. Evidence showed that bullets found near the victims' bodies were fired from a .22 caliber rifle and a .38 caliber revolver and according to another witness, an individual wanted to buy a .38 caliber revolver from defendant; essentially, when all of the evidence was viewed in a light most favorable to the state, it tended to connect defendant to the commission of the crimes. Gilcrease v. State, 2009 Ark. 298, 318 S.W.3d 70 (2009).

5-2-406. Multiple convictions — Different degrees.

CASE NOTES

Applicability.

Although this section is a correct statement of the law, it is not a model jury instruction; it is unnecessary to give it to the jury when its substance is covered by other instructions. Wilson v. State, 364 Ark. 550, 222 S.W.3d 171 (2006).

During defendant's trial for capital murder, the trial court correctly refused to give a proffered non-model jury instruction because defendant was tried alone and the liability of her sons, who were also charged with capital murder for the murder of their landlord, had not been decided; this section is not relevant where the defendant is tried alone. Wilson v. State, 364 Ark. 550, 222 S.W.3d 171 (2006).

Trial court did not err in refusing to give the jury instruction concerning different criminal liabilities of co-defendants because the jury found defendant guilty of capital murder, even though it had been instructed on the lesser included offenses of first and second-degree murder; thus, any error in failing to give a manslaughter or negligent homicide instruction was cured. Vidos v. State, 367 Ark. 296, 239 S.W.3d 467 (2006).

Subchapter 5 — Organizations and Their Agents

SECTION.
5-2-501. Definitions.

5-2-501. Definitions.

As used in this subchapter:

(1) "Agent" means any officer, director, or employee of an organization or any other person who is authorized to act in behalf of an organization;

(2) "High managerial agent" means an agent or officer of an organization who has duties of such responsibility that his or her conduct reasonably may be assumed to represent the policy of the organization; and

(3) "Organization" means a legal entity and includes:

(A) A corporation, company, association, firm, partnership, or joint-stock company;

(B) A foundation, institution, society, union, club, or church; or

(C) Any other group of persons organized for any purpose.

History. Acts 1975, No. 280, § 401; A.S.A. 1947, § 41-401.

Publisher's Notes. This section is being set out to reflect a change at the end of (2).

Subchapter 6 — Justification

SECTION.
5-2-605. Use of physical force generally.
5-2-606. Use of physical force in defense of a person.
5-2-607. Use of deadly physical force in defense of a person.
5-2-622. Gambling debts and losses.

5-2-601. Definitions.

CASE NOTES

Deadly Physical Force.

Preponderance of the evidence supported the district court's finding that defendant's use of deadly physical force under subdivisions (2) and (6)(B) of this section, which occurred when he pointed a loaded pistol at an undercover officer, was not justified or in self defense, and thus, he was guilty of the felony of aggravated assault under Arkansas law, and the four-level enhancement under U.S. Sentencing Guidelines Manual § 2K2.1(b)(5), now (b)(6), was properly imposed because (1) defendant did not act in self-defense within the meaning of § 5-13-204(c)(2) as he used deadly force against men who had obeyed his command to leave his property and who were loitering on the public sidewalk in front of his house as there was no evidence they were imminently endangering defendant's life under § 5-2-607(a); (2) under § 5-2-607(b)(1), defendant could not use deadly force after he had retreated safely to his house and returned later, unprovoked, to threaten the men; (3) defendant's conduct was not justified as permissible defense of his property within the purview of § 5-2-608 because use of deadly physical force was not authorized by § 5-2-607, and he had no reason to believe that the men who had quietly obeyed a command to leave his property would come back to commit arson or burglary; and (4) defendant's conduct was not justified to defend his home under § 5-2-620 because the men defendant assaulted

were not attempting to enter his home, so the statute did not apply. United States v. Raglin, 500 F.3d 675 (8th Cir. 2007).

5-2-603. Execution of public duty.

CASE NOTES

Applicability.

In a case in which defendant, a former correctional officer, was convicted by a jury for possession of methamphetamine with the intent to deliver, possession of marijuana with the intent to deliver, possession of drug paraphernalia, and furnishing prohibited articles, he argued unsuccessfully that the circuit court erred in rejecting a proffered jury instruction on justification. Defendant did not testify at trial, and there was no evidence presented below supporting appellant's claim that his possession was the result of confiscating the contraband; rather, the testimony indicated that he was attempting to evade detection. Waller v. State, 2010 Ark. App. 56, — S.W.3d — (2010).

5-2-604. Choice of evils.

CASE NOTES

Actor's Conduct.

In a case where defendant was found guilty of being a felon in possession of a firearm, the trial court properly denied his request for a jury instruction on the "choice of evils" defense under this section because (1) although he needed money, the situation did not rise to the level of the extraordinary attendant circumstances that was required to invoke the "choice of evils" defense; and (2) there were reasonable, legal alternatives to his conduct such as having his father or another non-felon pawn the firearm. Prodell v. State, 102 Ark. App. 360, 285 S.W.3d 673 (2008).

5-2-605. Use of physical force generally.

The use upon another person of physical force that would otherwise constitute an offense is justifiable under any of the following circumstances:

(1) A parent, teacher, guardian, or other person entrusted with care and supervision of a minor or an incompetent person may use reasonable and appropriate physical force upon the minor or incompetent person when and to the extent reasonably necessary to maintain discipline or to promote the welfare of the minor or incompetent person;

(2) A warden or other authorized official of a correctional facility may use nondeadly physical force to the extent reasonably necessary to maintain order and discipline;

(3) A person responsible for the maintenance of order in a common carrier or a person acting under the responsible person's direction may use nondeadly physical force to the extent reasonably necessary to maintain order;

(4) A person who reasonably believes that another person is about to commit suicide or to inflict serious physical injury upon himself or herself may use nondeadly physical force upon the other person to the extent reasonably necessary to thwart the suicide or infliction of serious physical injury;

(5) A duly licensed physician or a person assisting a duly licensed physician at the duly licensed physician's direction may use physical force for the purpose of administering a recognized form of treatment reasonably adapted to promoting the physical or mental health of a patient if the treatment is administered:

(A) With the consent of the patient or, if the patient is a minor who is unable to appreciate or understand the nature or possible consequences of the proposed medical treatment or is an incompetent person, with the consent of a parent, guardian, or other person entrusted with the patient's care and supervision; or

(B) In an emergency when the duly licensed physician reasonably believes that no person competent to consent can be consulted and that a reasonable person, wishing to safeguard the welfare of the patient, would consent.

History. Acts 1975, No. 280, § 505; A.S.A. 1947, § 41-505; Acts 2007, No. 827, § 12.

Amendments. The 2007 amendment substituted "suicide or infliction of serious physical injury" for "result" at the end of (4).

5-2-606. Use of physical force in defense of a person.

(a)(1) A person is justified in using physical force upon another person to defend himself or herself or a third person from what the person reasonably believes to be the use or imminent use of unlawful physical force by that other person, and the person may use a degree of force that he or she reasonably believes to be necessary.

(2) However, the person may not use deadly physical force except as provided in § 5-2-607.

(b) A person is not justified in using physical force upon another person if:

(1) With purpose to cause physical injury or death to the other person, the person provokes the use of unlawful physical force by the other person;

(2)(A) The person is the initial aggressor.

(B) However, the initial aggressor's use of physical force upon another person is justifiable if:

(i) The initial aggressor in good faith withdraws from the encounter and effectively communicates to the other person his or her purpose to withdraw from the encounter; and

(ii) The other person continues or threatens to continue the use of unlawful physical force; or

(3) The physical force involved is the product of a combat by agreement not authorized by law.

History. Acts 1975, No. 280, § 506; A.S.A. 1947, § 41-506; Acts 2007, No. 827, § 13.

Amendments. The 2007 amendment substituted "initial aggressor's" for "person's" in (b)(2)(B) and "initial aggressor" for "person" in (b)(2)(B)(i).

CASE NOTES

Analysis

Evidence.
Justification.

Evidence.

In a case involving terroristic acts under § 5-13-310(a)(1), the exclusion of a computer-generated threat to bolster a self-defense claim was error since the evidence was relevant under Ark. R. Evid. 401; however, the error was harmless since evidence of other threats could have been elicited. McKeever v. State, 367 Ark. 374, 240 S.W.2d 583 (2006).

Justification.

Because a juvenile's father had not resorted to use of a deadly weapon during an argument, because there had been an interlude of approximately five minutes since their last confrontation, because the father, at the time he was struck, had turned away from the juvenile, and because the juvenile did not testify as to whether the juvenile's beliefs were reasonable, the juvenile lacked justification under subdivision (a)(1) of this section and §§ 5-1-102(18), 5-2-607(a)(1), (2), and was properly adjudicated as a delinquent for second-degree domestic battering. D.W. v. State, 2011 Ark. App. 187, — S.W.3d — (2011).

5-2-607. Use of deadly physical force in defense of a person.

(a) A person is justified in using deadly physical force upon another person if the person reasonably believes that the other person is:

(1) Committing or about to commit a felony involving force or violence;

(2) Using or about to use unlawful deadly physical force; or

(3) Imminently endangering the person's life or imminently about to victimize the person as described in § 9-15-103 from the continuation of a pattern of domestic abuse.

(b) A person may not use deadly physical force in self-defense if the person knows that he or she can avoid the necessity of using deadly physical force with complete safety:

(1)(A) By retreating.

(B) However, a person is not required to retreat if the person is:

(i) In the person's dwelling or on the curtilage surrounding the person's dwelling and was not the original aggressor; or

(ii) A law enforcement officer or a person assisting at the direction of a law enforcement officer; or

(2) By surrendering possession of property to a person claiming a lawful right to possession of the property.

(c) As used in this section:

(1) "Curtilage" means the land adjoining a dwelling that is convenient for residential purposes and habitually used for residential purposes, but not necessarily enclosed, and includes an outbuilding that is directly and intimately connected with the dwelling and in close proximity to the dwelling; and

(2) "Domestic abuse" means:

(A) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury, or assault between family or household members; or

(B) Any sexual conduct between family or household members, whether minors or adults, that constitutes a crime under the laws of this state.

History. Acts 1975, No. 280, § 507; A.S.A. 1947, § 41-507; Acts 1997, No. 1257, § 1; 2007, No. 111, § 1; 2009, No. 748, § 2.

Amendments. The 2007 amendment inserted "or the curtilage surrounding the person's dwelling" in (b)(1)(B)(i); and added (c).

The 2009 amendment, in (a)(3), deleted (a)(3)(B) and redesignated the remaining subdivision accordingly; made a stylistic change in the introductory language of (b); inserted (c)(2), redesignated the remainder of (c) accordingly, substituted "residential" for "family" twice in (c)(1), and made related changes.

CASE NOTES

Analysis

Avoidance of Danger.
Instructions.
Reasonable Belief or State of Mind.
Self-Defense.

Avoidance of Danger.

Preponderance of the evidence supported the district court's finding that defendant's use of deadly physical force under § 5-2-601(2) and (6)(B), which occurred when he pointed a loaded pistol at an undercover officer, was not justified or in self defense, and thus, he was guilty of the felony of aggravated assault under Arkansas law, and the four-level enhancement under U.S. Sentencing Guidelines Manual § 2K2.1(b)(5), now (b)(6), was properly imposed because (1) defendant did not act in self-defense within the meaning of § 5-13-204(c)(2) as he used deadly force against men who had obeyed his command to leave his property and who were loitering on the public sidewalk in front of his house as there was no evidence they were imminently endangering defendant's life under subsection (a) of this section; (2) under subdivision (b)(1) of this section, defendant could not use deadly force after he had retreated safely to his house and returned later, unprovoked, to threaten the men; (3) defendant's conduct was not justified as permissible defense of his property within the purview of § 5-2-608 because use of deadly physical force was not authorized by this section, and he had no reason to believe that the men who had quietly obeyed a command to leave his property would come back to commit arson or burglary; and (4) defendant's conduct was not justified to defend his home under § 5-2-620 because the men defendant assaulted were not attempting to enter his home, so the statute did not apply. United States v. Raglin, 500 F.3d 675 (8th Cir. 2007).

Instructions.

Because second-degree battery has as one of its elements the infliction of serious physical injury, it is a "felony involving force or violence"; thus, in a second-degree murder case, the trial court erred by failing to give a jury instruction for justification that had both second-degree battery and unlawful deadly physical force alternatives since both were warranted by evidence that defendant was confronted by three men in an attack before he stabbed one of them in the heart with a pocket knife. Hamilton v. State, 97 Ark. App. 172, 245 S.W.3d 710 (2006).

Defendant's challenge to the jury instruction used by the trial court for justification and use of physical force in defense of a person was more lenient than the instruction that defendant requested, which was based upon the use of deadly physical force, pursuant to this section, and defendant did not have a cognizable habeas corpus claim based upon the use of the instruction. Cagle v. Norris, 474 F.3d 1090 (8th Cir. 2007).

In a case in which the jury was instructed on justification and the use of deadly force in defense of a person under Ark. Model Jury Instruction Crim. § 705 (2d ed.) that reflected the language of this section and defendant was convicted by a jury of second-degree murder and was sentenced to prison under the enhancement provision for a total of 540 months, defendant argued unsuccessfully that the

circuit court erred by refusing the jury instruction he proffered on self-defense, a non-model jury instruction reflecting the language of § 5-2-620. There was no merit to his argument that mere technical changes to § 5-2-620 and the legislature's reaffirmation of the statute's public policy somehow translated into legislative intent that juries in criminal cases be instructed as to an individual's right to defend himself or herself against a person intruding into his or her home. Hutchinson v. State, 2010 Ark. App. 235, — S.W.3d — (2010).

Reasonable Belief or State of Mind.

Because a juvenile's father had not resorted to use of a deadly weapon during an argument, because there had been an interlude of approximately five minutes since their last confrontation, because the father, at the time he was struck, had turned away from the juvenile, and because the juvenile did not testify as to whether the juvenile's beliefs were reasonable, the juvenile lacked justification under §§ 5-1-102(18), 5-2-606(a)(1), and subdivisions (a)(1) and (2) of this section, and was properly adjudicated as a delinquent for second-degree domestic battering. D.W. v. State, 2011 Ark. App. 187, — S.W.3d — (2011).

Self-Defense.

When defendant shot and killed the victim outside his aunt's home, she testified that the victim took a few steps backward, and defendant raised his shirt, brandished a weapon, and fired upon the victim; she did not see a gun in the victim's hand, and her son also testified that defendant was the first to draw a weapon. In defendant's criminal prosecution for murder, the trial court made a credibility determination, found that defendant was the initial aggressor in the deadly altercation, and rejected his self-defense claim under subdivision (a)(2) of this section; the Court of Appeals of Arkansas found substantial evidence to support the trial court's decision. Dishman v. State, 2009 Ark. App. 715, — S.W.3d — (2009).

Substantial evidence negated defendant's claim of self-defense under subdivision (a)(2) of this section in his trial for first degree battery, under § 5-13-201, because there was no evidence that the victim was armed when defendant shot him and, although defendant testified that the victim attacked him earlier in the day, there was no evidence of an injury to defendant and defendant testified that he was not afraid of the victim; although defendant testified at trial that he was afraid that the victim was going to attack him at the time that he shot him, defendant never made a similar claim in his statement to the police after the incident. Metcalf v. State, 2011 Ark. App. 55, — S.W.3d — (2011), rehearing denied, — Ark. App. —, — S.W.3d —, 2011 Ark. App. LEXIS 147 (Feb. 23, 2011).

5-2-608. Use of physical force in defense of premises.

CASE NOTES

Evidence.

Preponderance of the evidence supported the district court's finding that defendant's use of deadly physical force under § 5-2-601(2) and (6)(B), which occurred when he pointed a loaded pistol at an undercover officer, was not justified or in self defense, and thus, he was guilty of the felony of aggravated assault under Arkansas law, and the four-level enhancement under U.S. Sentencing Guidelines Manual § 2K2.1(b)(5), now (b)(6), was properly imposed because (1) defendant did not act in self-defense within the meaning of § 5-13-204(c)(2) as he used deadly force against men who had obeyed his command to leave his property and who were loitering on the public sidewalk in front of his house as there was no evidence they were imminently endangering defendant's life under § 5-2-607(a); (2) under § 5-2-607(b)(1), defendant could not use deadly force after he had retreated safely to his house and returned later, unprovoked, to threaten the men; (3) defendant's conduct was not justified as permissible defense of his property within the purview of this section because use of deadly physical force was not authorized by § 5-2-607, and he had no reason to believe that the men who had quietly obeyed a command to leave his property would come back to commit arson or burglary; and (4) defendant's conduct was not

justified to defend his home under § 5-2-620 because the men defendant assaulted were not attempting to enter his home, so the statute did not apply. United States v. Raglin, 500 F.3d 675 (8th Cir. 2007).

Defendant's conviction for battery in the second degree was proper because he did not have a justification defense under subsection (a) of this section since his version of the events was unbelievable; any reasonable person would have realized that the victim was acting on behalf of a repossession agency and therefore, defendant could not have been acting on a reasonable belief that he was preventing a criminal trespass. There was also no evidence to indicate that the victim used force against defendant or threatened him with force. Washington v. State, 2010 Ark. App. 339, — S.W.3d — (2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 379 (June 24, 2010).

5-2-614. Use of reckless or negligent force.

CASE NOTES

Instructions.

There was no abuse of discretion in a trial court's refusal of defendant's proffered imperfect self-defense jury instruction because there was no rational basis for the instruction where the only basis for the instruction was defendant's self-serving statements or testimony, contradicted by other witnesses. Norris v. State, 2010 Ark. 174, — S.W.3d — (2010), rehearing denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 292 (May 20, 2010).

5-2-620. Use of force to defend persons and property within home.

CASE NOTES

Analysis

Instructions.
Unprovoked Attack.

Instructions.

In a case in which the jury was instructed on justification and the use of deadly force in defense of a person under Ark. Model Jury Instruction Crim. § 705 (2d ed.) that reflected the language of § 5-2-607 and defendant was convicted by a jury of second-degree murder and was sentenced to prison under the enhancement provision for a total of 540 months, defendant argued unsuccessfully that the circuit court erred by refusing the jury instruction he proffered on self-defense, a non-model jury instruction reflecting the language of this section. There was no merit to his argument that mere technical changes to this section and the legislature's reaffirmation of the statute's public policy somehow translated into legislative intent that juries in criminal cases be instructed as to an individual's right to defend himself or herself against a person intruding into his or her home. Hutchinson v. State, 2010 Ark. App. 235, — S.W.3d — (2010).

Unprovoked Attack.

Preponderance of the evidence supported the district court's finding that defendant's use of deadly physical force under § 5-2-601(2) and (6)(B), which occurred when he pointed a loaded pistol at an undercover officer, was not justified or in self defense, and thus, he was guilty of the felony of aggravated assault under Arkansas law, and the four-level enhancement under U.S. Sentencing Guidelines Manual § 2K2.1(b)(5), now (b)(6), was properly imposed because (1) defendant did not act in self-defense within the meaning of § 5-13-204(c)(2) as he used deadly force against men who had obeyed his command to leave his property and who were loitering on the public sidewalk in front of his house as there was no evidence they were imminently endangering defendant's life under § 5-2-607(a); (2) under § 5-2-607(b)(1), defendant could not use deadly force after he had retreated safely to his house and returned later, unprovoked, to threaten the men; (3) defendant's conduct was not justified as per-

missible defense of his property within the purview of § 5-2-608 because use of deadly physical force was not authorized by § 5-2-607, and he had no reason to believe that the men who had quietly obeyed a command to leave his property would come back to commit arson or burglary; and (4) defendant's conduct was not justified to defend his home under this section because the men defendant assaulted were not attempting to enter his home, so the statute did not apply. United States v. Raglin, 500 F.3d 675 (8th Cir. 2007).

5-2-622. Gambling debts and losses.

It is no defense to a prosecution for a crime of violence that a person was seeking recovery or replevin of a gambling debt or loss in circumstances in which civil recovery is permitted by § 16-118-103.

History. Acts 2009, No. 460, § 1.

A.C.R.C. Notes. Acts 2009, No. 460, § 3, provided: "It is the intent of this Act to overrule Daniels v. State, 373 Ark. 536, ___ S.W.3d ___ (2008), and its interpretation of §16-118-103(a)(1). That case and its interpretation of replevin and the holding in Davidson v. State, 200 Ark. 495, 139 S.W.2d 409 (1940), are contrary to the public policy of this State."

CHAPTER 3

INCHOATE OFFENSES

Subchapter 2 — Criminal Attempt

5-3-201. Conduct constituting attempt.

CASE NOTES

Analysis

Attempted Capital Murder.
Attempted Criminal Mischief.
Attempted Murder.
Attempted Rape.
Evidence.
Lesser Included Offenses.

Attempted Capital Murder.

Aggravated robbery is not a lesser included offense of attempted capital murder because, while an aggravated-robbery charge shares the intent to rob with attempted capital murder, aggravated robbery also requires one of three other elements. Two of those elements, being armed with a deadly weapon, or representing as such, are unique to aggravated robbery, and the third possible element of aggravated robbery is having inflicted or attempted to inflict death or serious physical injury upon another, which is not equivalent to the element in attempted capital murder that a defendant, in the course of or in flight from such robbery, caused the death of a person under circumstances manifesting extreme indifference to the value of human life. Clark v. State, 373 Ark. 161, 282 S.W.3d 801 (2008).

Prohibition against double jeopardy was not violated when defendant was convicted of aggravated robbery and attempted capital murder because the robbery was the underlying felony, and aggravated robbery was not the lesser-included offense of attempted capital murder. Clark v. State, 373 Ark. 161, 282 S.W.3d 801 (2008).

Defendant's conviction for attempted capital murder, in violation of § 5-10-101(a)(4) and subdivision (a)(2) of this section, was supported by the evidence because the victim, defendant's wife, testified that he came into the garage demanding to talk to her, shot her, and commented that she should die; defendant's coworker testified that defendant stated that he was going to shoot his wife if she had any divorce papers. Johnson v.

State, 375 Ark. 462, 291 S.W.3d 581 (2009), cert. denied, Johnson v. Arkansas, — U.S. —, 130 S. Ct. 118, 175 L. Ed. 2d 77 (2009).

Where defendant picked his ex-wife up from work, drove her to a bridge, stabbed her, threw her to the ground, and pushed her into the water, the evidence was sufficient to support his conviction for attempted first-degree murder in violation of § 5-10-102(a)(2) and subdivision (a)(2) of this section. When defendant learned the police had been called, he threw the victim a rope and told her to get herself out the water. Jones v. State, 2009 Ark. App. 135, — S.W.3d — (2009).

In a case in which defendant was found guilty on three counts of attempted first-degree murder, of being a felon in possession of a firearm, and three counts of committing a terroristic act, he unsuccessfully argued that substantial evidence did not support his convictions; while the evidence was circumstantial, substantial evidence supported the conclusion that defendant committed the crimes in question. Moments after the shooting, a dark-colored car was observed speeding away from the area without its lights on even though it was dark outside, that car crashed into another vehicle five blocks from the shooting, a witness positively identified defendant as the person who emerged from the driver's side of the car carrying a long rifle, shell casings from a rifle were recovered from the scene of the shooting, defendant's DNA was found on the driver's side airbag of the car, and the car contained a letter addressed to defendant. Smith v. State, 2010 Ark. App. 216, — S.W.3d — (2010).

Attempted Criminal Mischief.

Judgment notwithstanding the verdict was properly granted in a malicious prosecution case where the passenger of a truck was arrested when the vehicle bumped a key-card entry gate; even if there was no damage to the gate or a mistake about such, there was still probable cause for an arrest for criminal mischief or attempt under Ark. R. Crim. P. 4.1(c). Coombs v. Hot Springs Village Prop. Owners Ass'n, 98 Ark. App. 226, 254 S.W.3d 5 (2007), rehearing denied, Coombs v. Hot Springs Vill. Prop. Owners Ass'n, — Ark. App. —, — S.W.3d —, 2007 Ark. App. LEXIS 543 (May 2, 2007).

Attempted Murder.

Evidence was sufficient to sustain defendant's conviction for attempted first-degree murder under subdivision (a)(2) of this section and § 5-10-102(a)(1) as the evidence demonstrated that defendant, in the process of fleeing a store that he had just robbed at gunpoint, shot at a police officer two times. A jury could reasonably conclude that the act of shooting at someone was a substantial step toward causing that person's death. Lambert v. State, 2011 Ark. App. 258, — S.W.3d — (2011).

Attempted Rape.

Evidence was sufficient to sustain an attempted rape conviction where defendant initiated a call to the 13 year old victim, picked her up under false pretenses, isolated her in a motel room, told her that he and his girlfriend intended to engage in sexual intercourse with her, and he returned to the motel room with his girlfriend; those steps went beyond mere planning and preparation. Mitchem v. State, 96 Ark. App. 78, 238 S.W.3d 623 (2006).

Defendant's conviction for attempted rape of his 13-year-old stepdaughter, in violation of § 5-14-103(a)(3)(A) and subsection (b) of this section, was supported by the evidence because the victim testified that defendant, who wanted oral sex from her, thrust himself upon her while she was in the shower until her grandmother, who lived next door, appeared at the front door. Forrest v. State, 2010 Ark. App. 686, — S.W.3d — (2010).

Evidence.

Sufficient evidence supported the conclusion that a defendant intended to kill a victim: a witness testified that the witness gave defendant a gun, other witnesses testified that defendant shot the victim with that gun, defendant's girlfriend testified that while waiting for defendant in a car, the girlfriend heard two or three shots, and then defendant ran to the car, and inconsistent witness statements regarding whether the shooting occurred inside or outside the victim's apartment were not relevant to the conviction; therefore, defendant's motion for a directed verdict was properly denied. Hawkins v. State, 2009 Ark. App. 675, — S.W.3d — (2009).

Lesser Included Offenses.

During defendant's trial for attempted murder, the court did not err in refusing to instruct the jury on the lesser-included offense of attempted extreme-emotional-disturbance manslaughter, in violation of § 5-10-104(a)(1)(A) and subsection (b) of this section, because defendant's self-serving testimony was the only evidence of provocation presented; the evidence corroborated the victim's testimony that defendant stabbed the victim with a knife. Townsell v. State, 2010 Ark. App. 754, — S.W.3d — (2010).

5-3-203. Classification.

CASE NOTES

Cited: Small v. State, 371 Ark. 244, 264 S.W.3d 512 (2007).

5-3-204. Renunciation.

RESEARCH REFERENCES

Ark. L. Rev. Article, Ethical and Effective Representation in Arkansas Capital Trials, 60 Ark. L. Rev. 1.

Subchapter 3 — Criminal Solicitation

5-3-302. Renunciation.

RESEARCH REFERENCES

Ark. L. Rev. Article, Ethical and Effective Representation in Arkansas Capital Trials, 60 Ark. L. Rev. 1.

Subchapter 4 — Criminal Conspiracy

5-3-405. Renunciation of criminal purpose.

RESEARCH REFERENCES

Ark. L. Rev. Article, Ethical and Effective Representation in Arkansas Capital Trials, 60 Ark. L. Rev. 1.

CHAPTER 4

DISPOSITION OF OFFENDERS

SUBCHAPTER.

1. General Provisions.
2. Fines, Costs, and Restitution.
3. Suspension or Probation.
4. Imprisonment.
5. Extended Term of Imprisonment.

SUBCHAPTER 1 — GENERAL PROVISIONS

5-4-101. Definitions.

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Survey of Legislation, 2005 Arkansas General Assembly, Criminal Law, 28 U. Ark. Little Rock L. Rev. 335.

CASE NOTES

ANALYSIS

Restitution.
Suspension or Probation.

Restitution.

Trial court had no jurisdiction to revoke defendant's suspended sentence because defendant owed no restitution at the end of his suspended sentence, and the trial court could not retain jurisdiction over him; defendant's child support was not to make good an actual economic loss of a victim of his failure to comply with the reporting requirements of the Sex and Child Offender Registration Act. Owens v. State, 2009 Ark. App. 532, — S.W.3d — (2009).

Suspension or Probation.

Based on the clear, unambiguous language of § 12-12-1109(a)(2)(A) and § 12-12-1103(1), it was clear that the trial court did not illegally sentence defendant by requiring him to submit to a DNA sample after he received a suspended sentence because whatever conflict subsection (a) of this section might have provided, if any, was resolved by the fact that its definitions were used only for Title 5, Chapter 4. Davis v. State, 94 Ark. App. 240, 228 S.W.3d 529 (2006).

5-4-103. Sentencing — Role of jury and court.

CASE NOTES

ANALYSIS

Sentence Fixed by Jury.
Sentencing by Court.

Sentence Fixed by Jury.

Trial court imposed an illegal sentence when it rejected a jury's verdict and took it upon itself to sentence defendant where the jury's sentencing verdict of zero years in prison and a fine of zero dollars was a proper and valid sentence for second-degree battery. Donaldson v. State, 370 Ark. 3, 257 S.W.3d 74 (2007).

Sentencing by Court.

Sentence imposed on the enhancement offense of commission of a felony with a firearm was not void or illegal as it was specifically allowed by statute. By failing to object when given the opportunity, defendants indicated their agreement with the trial court's fixing the punishment. Watkins v. State, 2009 Ark. App. 124, 302 S.W.3d 635 (2009).

Under subdivision (b)(4) of this section, the judge rather than the jury may impose a sentence where the prosecution and the defense agree that the court may fix pun-

ishment. Nevertheless, it is generally improper for the trial court to sentence on the enhancement provision in place of the jury. Watkins v. State, 2010 Ark. 156, — S.W.3d — (2010).

Cited: Sullivan v. State, 366 Ark. 183, 234 S.W.3d 285 (2006); Loar v. State, 368 Ark. 171, 243 S.W.3d 923 (2006); Henry v. State, 2011 Ark. App. 169, — S.W.3d — (2011).

5-4-104. Authorized sentences generally.

(a) No defendant convicted of an offense shall be sentenced otherwise than in accordance with this chapter.

(b) A defendant convicted of capital murder, § 5-10-101, or treason, § 5-51-201, shall be sentenced to death or life imprisonment without parole in accordance with §§ 5-4-601 — 5-4-605, 5-4-607, and 5-4-608.

(c)(1) A defendant convicted of a Class Y felony or murder in the second degree, § 5-10-103, shall be sentenced to a term of imprisonment in accordance with §§ 5-4-401 — 5-4-404.

(2) In addition to imposing a term of imprisonment, the trial court may sentence a defendant convicted of a Class Y felony or murder in the second degree, § 5-10-103, to any one (1) or more of the following:

(A) Pay a fine as authorized by §§ 5-4-201 and 5-4-202;

(B) Make restitution as authorized by § 5-4-205; or

(C) Suspend imposition of an additional term of imprisonment, as authorized by subdivision (e)(3) of this section.

(d) A defendant convicted of an offense other than a Class Y felony, capital murder, § 5-10-101, treason, § 5-51-201, or murder in the second degree, § 5-10-103, may be sentenced to any one (1) or more of the following, except as precluded by subsection (e) of this section:

(1) Imprisonment as authorized by §§ 5-4-401 — 5-4-404;

(2) Probation as authorized by §§ 5-4-301 — 5-4-307 and 16-93-306 — 16-93-314;

(3) Payment of a fine as authorized by §§ 5-4-201 and 5-4-202;

(4) Restitution as authorized by a provision of § 5-4-205; or

(5) Imprisonment and payment of a fine.

(e)(1)(A) The court shall not suspend imposition of sentence as to a term of imprisonment nor place the defendant on probation for the following offenses:

(i) Capital murder, § 5-10-101;

(ii) Treason, § 5-51-201;

(iii) A Class Y felony, except to the extent suspension of an additional term of imprisonment is permitted in subsection (c) of this section;

(iv) Driving while intoxicated, § 5-65-103;

(v) Murder in the second degree, § 5-10-103, except to the extent suspension of an additional term of imprisonment is permitted in subsection (c) of this section; or

(vi) Engaging in a continuing criminal enterprise, § 5-64-405.

(B)(i) In any other case, the court may suspend imposition of sentence or place the defendant on probation, in accordance with §§ 5-4-301 — 5-4-307 and 16-93-306 — 16-93-314, except as otherwise specifically prohibited by statute.

(ii) The court may not suspend execution of sentence.

(2) If the offense is punishable by fine and imprisonment, the court may sentence the defendant to pay a fine and suspend imposition of the sentence as to imprisonment or place the defendant on probation.

(3)(A) The court may sentence the defendant to a term of imprisonment and suspend imposition of sentence as to an additional term of imprisonment.

(B) However, the court shall not sentence a defendant to imprisonment and place him or her on probation, except as authorized by § 5-4-304.

(f)(1) If the court determines that an offender under eighteen (18) years of age would be more amenable to a rehabilitation program of the Division of Youth Services of the Department of Human Services and that he or she previously has not been committed to the division on more than one (1) occasion, the court may sentence the offender under eighteen (18) years of age to the Department of Correction for a term of years, suspend the sentence, and commit him or her to the custody of the division.

(2) In a case under subdivision (f)(1) of this section, if the offender under eighteen (18) years of age completes the program of the division satisfactorily, the division shall return him or her to the sentencing court and provide the sentencing court with a written report of his or her progress and a recommendation that the offender under eighteen (18) years of age be placed on probation.

(3)(A) In the event that the offender under eighteen (18) years of age violate a rule of the division's program or facility or is otherwise not amenable to the division's rehabilitative effort, the division may return him or her to the sentencing court with a written report of his or her conduct and a recommendation that the offender under eighteen (18) years of age be transferred to the Department of Correction.

(B) If the court finds that the offender under eighteen (18) years of age has violated a rule of the division's program or facility or is otherwise not amenable to the division's rehabilitative effort, the court shall then revoke the suspension of the sentence originally imposed and commit the offender under eighteen (18) years of age to the Department of Correction.

(g) This chapter does not deprive the court of any authority conferred by law to:

(1) Order a forfeiture of property;

(2) Suspend or cancel a license;

(3) Dissolve a corporation;

(4) Remove a person from office;

(5) Cite for contempt;

(6) Impose any civil penalty; or

(7) Assess costs as set forth in subsection (h) of this section.

(h) A defendant convicted of violating § 5-11-106, in which a minor was unlawfully detained, restrained, taken, enticed, or kept, may be

assessed and ordered to pay expenses incurred by a law enforcement agency, the Department of Human Services, or the lawful custodian in searching for or returning the minor to the lawful custodian.

History. Acts 1975, No. 280, § 803; 1981, No. 620, § 7; 1983, No. 409, § 1; A.S.A. 1947, § 41-803; Acts 1987, No. 487, § 1; 1991, No. 608, §§ 1, 2; 1993, No. 192, § 1; 1993, No. 532, §§ 5, 9; 1993, No. 533, §§ 2, 3; 1993, No. 550, §§ 5, 9; 1993, No. 553, §§ 2, 3; 2001, No. 559, § 8; 2009, No. 748, § 3; 2011, No. 570, §§ 3, 4; 2011, No. 1120, §§ 1, 2.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "Legislative intent. The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Amendments. The 2009 amendment substituted "§ 5-64-405" for "former § 5-64-414" in (e)(1)(A)(vi).

The 2011 amendment by No. 570 inserted "5-4-307 and 16-93-306 — 16-93-314" in (d)(2) and (e)(1)(B)(i).

The 2011 amendment by No. 1120 substituted "§§ 5-4-201 and 5-4-202" for "§§ 5-4-201 — 5-4-203" in (c)(2)(A) and (d)(3).

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Annual Survey of Case Law: Criminal Law, 29 U. Ark. Little Rock L. Rev. 849.

CASE NOTES

Analysis

Illegal Sentence.
Unauthorized Sentence.

Illegal Sentence.

Circuit court imposed an illegal sentence upon defendant when it attempted to require him to undergo drug and alcohol treatment as a condition of his incarceration after it revoked his probation because no statute authorized the imposition of conditions upon a sentence of incarceration and thus, the circuit court lacked authority to do so. Richie v. State, 2009 Ark. 602, — S.W.3d — (2009).

Unauthorized Sentence.

Circuit court's special condition in defendant's sentence that he complete a mandatory drug treatment program while in prison was illegal as it had no authority to impose such a condition under subsection (d) of this section. Once he was sentenced, it was for the Arkansas Department of Correction to determine the conditions of his incarceration. Cline v. State, 2011 Ark. App. 315, — S.W.3d — (2011).

Cited: Sullivan v. State, 366 Ark. 183, 234 S.W.3d 285 (2006); Donaldson v. State, 370 Ark. 3, 257 S.W.3d 74 (2007); Polivka v. State, 2010 Ark. 152, — S.W.3d — (2010).

5-4-105. [Repealed.]

A.C.R.C. Notes. Former subdivision (a)(1) of this section was amended by Acts 2011, No. 570, § 5 to delete the reference to § 5-4-311 and to insert references to § 16-90-1301 et seq. and § 16-93-314. However, Acts 2011, No. 626, § 1 specifically repealed this section, and, pursuant to § 1-2-207(b), was the later act.

Publisher's Notes. This section, concerning expungement and sealing options, was repealed by Acts 2011, No. 626, § 1. The section was derived from Acts 2007, No. 744, § 1.

Subchapter 2 — Fines, Costs, and Restitution

Effective Dates. Acts 2007, No. 346, § 2: Mar. 19, 2007. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that children and other citizens of this state are being exposed to harmful material by persons who violate obscenity laws for profit; that any person including an individual or an organization or an agent of an individual or an organization that obtains pecuniary gain from a felony violation of the obscenity laws should be subject to an increased fine; and that this act is necessary because an increased fine will deter future felony violations of obscenity laws. Therefore, an emergency is declared to exist and this act being necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

5-4-201. Fines — Limitations on amount.

(a) A defendant convicted of a felony may be sentenced to pay a fine:

(1) Not exceeding fifteen thousand dollars ($15,000) if the conviction is of a Class A felony or Class B felony;

(2) Not exceeding ten thousand dollars ($10,000) if the conviction is of a Class C felony or Class D felony;

(3) In accordance with a limitation of the statute defining the felony if the conviction is of an unclassified felony.

(b) A defendant convicted of a misdemeanor may be sentenced to pay a fine:

(1) Not exceeding two thousand five hundred dollars ($2,500) if the conviction is of a Class A misdemeanor;

(2) Not exceeding one thousand dollars ($1,000) if the conviction is of a Class B misdemeanor;

(3) Not exceeding five hundred dollars ($500) if the conviction is of a Class C misdemeanor; or

(4) In accordance with a limitation of the statute defining the misdemeanor if the conviction is of an unclassified misdemeanor.

(c) A defendant convicted of a violation may be sentenced to pay a fine:

(1) Not exceeding one hundred dollars ($100) if the violation is defined by the Arkansas Criminal Code or defined by a statute enacted subsequent to January 1, 1976, that does not prescribe a different limitation on the amount of the fine; or

(2) In accordance with a limitation of the statute defining the violation if that statute prescribes limitations on the amount of the fine.

(d)(1) Notwithstanding a limit imposed by this section, if the defendant has derived pecuniary gain from commission of an offense, then upon conviction of the offense the defendant may be sentenced to pay a fine not exceeding two (2) times the amount of the pecuniary gain.

(2) As used in this subsection, "pecuniary gain" means the amount of money or the value of property derived from the commission of the offense, less the amount of money or the value of property returned to the victim of the crime or seized by or surrendered to a lawful authority prior to the time sentence is imposed.

(e) An organization convicted of an offense may be sentenced to pay a fine authorized by subsection (d) of this section or not exceeding two (2) times the maximum fine otherwise authorized upon conviction of the offense by subsections (a), (b), or (c) of this section.

(f)(1) Notwithstanding a limit imposed by this section or the section defining the felony offense, if a defendant has derived pecuniary gain from the commission of a felony offense under § 5-68-201 et seq., § 5-68-301 et seq., the Arkansas Law on Obscenity, § 5-68-401 et seq., or § 5-68-501 et seq., then upon conviction of the felony offense, the defendant may be sentenced to pay a fine not exceeding two hundred fifty thousand dollars ($250,000).

(2) As used in this subsection, "derived pecuniary gain" means that a defendant received income, benefit, property, money, or anything of value from the commission of a felony offense under § 5-68-201 et seq., § 5-68-301 et seq., the Arkansas Law on Obscenity, § 5-68-401 et seq., or § 5-68-501 et seq.

History. Acts 1975, No. 280, § 1101; A.S.A. 1947, § 41-1101; Acts 2007, No. 346, § 1; 2009, No. 209, § 1.

Amendments. The 2007 amendment added (f).

The 2009 amendment substituted "two thousand five hundred dollars ($2,500)" for "one thousand dollars ($1,000)" in (b)(1), substituted "one thousand dollars ($1,000)" for "five hundred dollars "($500)" in (b)(2), and substituted "five hundred dollars "($500)" for "one hundred dollars ($100)" in (b)(3).

CASE NOTES

Analysis

Amount of Fine.
Evidence.
Sentence Appropriate.

Amount of Fine.

Trial court did not err in denying appellants a new trial or remittitur regarding a punitive damage award in favor of appellees, as the award was not in excess of federal due process standards, given that (1) appellees suffered economic harm, but the harm was much more than purely economic injury, as appellants cut down approximately 40 percent of appellees' future retirement homesite and the privacy afforded by the trees was very important to appellees, (2) appellants' action forced appellees to give up their plans to retire to the property and ultimately sell it, (3) the tree cutting was intentional and not an isolated incident, (4) the profit appellants received from the sale of their property was a direct result of the tree clearing on appellees' property, (5) the award was not so grossly excessive as to have violated federal due process, (6) each of appellants were on notice of and could have been charged with a Class C felony of criminal mischief under § 5-38-203(b)(1) with, under subdivision (a)(2) of this section, a potential fine of $10,000, plus a violation of § 15-32-101(a)(1), (7) was a misde-

meanor, with a potential fine and jail time, and (8) under § 18-60-102(a)(1), appellants had ample notice that their actions could result in a penalty of $25,000 punitive damages. Bronakowski v. Lindhurst, 2009 Ark. App. 513, 324 S.W.3d 719 (2009), rehearing denied, — Ark. App. —, — S.W.3d —, 2009 Ark. App. LEXIS 669 (July 29, 2009), review denied, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 804 (Dec. 3, 2009).

Evidence.

In a capital murder case, there was sufficient evidence that defendant murdered the victim for pecuniary gain where defendant took the victim's car, television set, silverware, Bible, and other items of personal property from her home after he killed her. Thessing v. State, 365 Ark. 384, 230 S.W.3d 526 (2006), cert. denied, Thessing v. Arkansas, 549 U.S. 891, 127 S. Ct. 193, 166 L. Ed. 2d 158 (2006).

Sentence Appropriate.

Sixty-day sentence for contempt based on a failure to pay child support was allowable, despite the lack of statutory authority under subdivision (b)(3) of this section, because the will of the Arkansas General Assembly was not a limitation upon the power of the trial court to inflict a reasonable punishment for disobedience. Norman v. Cooper, 101 Ark. App. 446, 278 S.W.3d 569 (2008).

Cited: Jester v. State, 367 Ark. 249, 239 S.W.3d 484 (2006).

5-4-202. Alternative sentence prohibited — Time of payment.

(a) If the defendant is sentenced to pay a fine or costs, the court shall not at the same time impose an alternative sentence or imprisonment to be served if the fine or costs are not paid.

(b)(1) If a defendant is sentenced to pay a fine or costs, the court may grant permission for payment to be made:

(A) Within a specified period of time; or

(B) In specified installments.

(2) If permission under subdivision (b)(1) of this section is not granted in the sentence, the fine or costs are payable immediately.

History. Acts 1975, No. 280, § 1102; A.S.A. 1947, § 41-1102; Acts 2011, No. 1120, § 3.

Amendments. The 2011 amendment deleted (a)(2).

5-4-203. [Repealed.]

Publisher's Notes. This section, concerning consequences of nonpayment, was repealed by Acts 2009, No. 633, § 1. The section was derived from Acts 1975, No. 280, § 1103; A.S.A. 1947, § 41-1103; Acts 1995, No. 1116, § 1; 2001, No. 1553, § 5; 2003, No. 110, § 1.

5-4-205. Restitution.

(a)(1) A defendant who is found guilty or who enters a plea of guilty or nolo contendere to an offense may be ordered to pay restitution.

(2) If the court decides not to order restitution or orders restitution of only a portion of the loss suffered by the victim, the court shall state on the record in detail the reasons for not ordering restitution or for ordering restitution of only a portion of the loss.

(b)(1) Whether a trial court or a jury, the sentencing authority shall make a determination of actual economic loss caused to a victim by the offense.

(2) When an offense has resulted in bodily injury to a victim, a restitution order entered under this section may require that the defendant:

(A) Pay the cost of a necessary medical or related professional service or device relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a recognized method of healing;

(B) Pay the cost of necessary physical and occupational therapy and rehabilitation;

(C)(i) Reimburse the victim for income lost by the victim as a result of the offense.

(ii) The maximum that a victim may recover for lost income is fifty thousand dollars ($50,000); and

(D) Pay an amount equal to the cost of a necessary funeral and related services in the case of an offense that resulted in bodily injury that also resulted in the death of a victim.

(3) When an offense has not resulted in bodily injury to a victim, a restitution order entered under this section may require that the defendant reimburse the victim for income lost by the victim as a result of the offense.

(4)(A) The determination of the amount of loss is a factual question to be decided by the preponderance of the evidence presented to the sentencing authority during the sentencing phase of a trial.

(B) The amount of loss may be decided by agreement between a defendant and the victim represented by the prosecuting attorney.

(5) If any item listed in subdivision (b)(2) of this section has been paid by the Crime Victims Reparations Board and the court orders restitution, the restitution order shall provide that the board is to be reimbursed by the defendant.

(c)(1) As used in this section and in any provision of law relating to restitution, "victim" means any person, partnership, corporation, or governmental entity or agency that suffers property damage or loss, monetary expense, or physical injury or death as a direct or indirect result of the defendant's offense or criminal episode.

(2) "Victim" includes a victim's estate if the victim is deceased and a victim's next of kin if the victim is deceased as a result of the offense.

(d) A record of a defendant shall not be expunged under § 16-90-901 et seq. until all court-ordered restitution has been paid.

(e)(1) Restitution shall be made immediately unless prior to the imposition of sentence the court determines that the defendant should be:

(A) Given a specified time to pay; or

(B)(i) Allowed to pay in specified installments.

(ii) If a court authorizes payment of restitution by a defendant in specified installments, a monthly installment fee of five dollars ($5.00) shall be assessed on the defendant for making restitution payments on an installment basis in addition to the restitution and other assessments authorized.

(iii) The monthly installment fee under subdivision (e)(1)(B)(ii) of this section shall be remitted to the collecting official to be used to defray the cost of restitution collection.

(iv) A district court may order installment payments of restitution to be collected first in lieu of the procedure under § 16-10-209(5)(F).

(2) In determining the method of payment, the court shall take into account:

(A) The financial resources of the defendant and the burden that payment of restitution will impose with regard to another obligation of the defendant;

(B) The ability of the defendant to pay restitution on an installment basis or on another condition to be fixed by the court; and

(C) The rehabilitative effect on the defendant of the payment of restitution and the method of payment.

(f)(1) If the defendant is placed on probation or any form of conditional release, any restitution ordered under this section is a condition of the suspended imposition of sentence, probation, parole, or transfer.

(2) The court may revoke probation and any agency establishing a condition of release may revoke the conditional release if the defendant fails to comply with the order and if the defendant has not made a good faith effort to comply with the order.

(3) In determining whether to revoke probation or conditional release, the court or releasing authority shall consider:

(A) The defendant's employment status;

(B) The defendant's earning ability;

(C) The defendant's financial resources;

(D) The willfulness of the defendant's failure to pay; and

(E) Any other special circumstances that may have a bearing on the defendant's ability to pay.

(g)(1) The court shall enter a judgment against the defendant for the amount determined under subdivision (b)(4) of this section.

(2) The judgment may be enforced by the state or a beneficiary of the judgment in the same manner as a judgment for money in a civil action.

(3) A judgment under this section may be discharged by a settlement between the defendant and the beneficiary of the judgment.

(4) The court shall determine priority among multiple beneficiaries on the basis of:

(A) The seriousness of the harm each beneficiary suffered;

(B) The other resources of the beneficiaries; and

(C) Other equitable factors.

(5) If more than one (1) defendant is convicted of the crime for which there is a judgment under this section, the defendants are jointly and severally liable for the judgment unless the court determines otherwise.

(6)(A) A judgment shall require payment to the Department of Community Correction.

(B) The department shall provide for supervision and disbursement of funds under subdivision (g)(6)(A) of this section by the department's authorized economic sanction officers.

(h)(1) A judgment under this section does not bar a remedy available in a civil action under other law.

(2) A payment under this section shall be credited against a money judgment obtained by the beneficiary of the payment in a civil action.

(3) A determination under this section and the fact that payment was or was not ordered or made:

(A) Are not admissible in evidence in a civil action; and

(B) Do not affect the merits of a civil action.

History. Acts 1993, No. 533, § 4; 1993, No. 553, § 4; 2001, No. 1059, § 1; 2003, No. 1336, § 1; 2009, No. 633, § 2; 2009, No. 770, § 1.

Amendments. The 2009 amendment by No. 633, in (e)(1)(B), inserted present (e)(1)(B)(iv) and redesignated the remaining text accordingly.

The 2009 amendment by No. 770 inserted (e)(1)(B)(ii) and (e)(1)(B)(iii), and redesignated the remaining text of (e)(1)(B) accordingly.

RESEARCH REFERENCES

ALR. Measure and Elements of Restitution to Which Victim is Entitled under State Criminal Statute — Payment for Installation of Alarm or Locks or Change of Locks Due to Burglary, Attempted Burglary, or Felonious Breaking and Entering. 44 A.L.R.6th 301.

Propriety, Measure, and Elements of Restitution to Which Victim is Entitled Under State Criminal Statute — Cruelty to, Killing, or Abandonment of, Animals. 45 A.L.R.6th 435.

Mandatory Victims Restitution Act — Constitutional Issues. 20 A.L.R. Fed. 2d 239.

CASE NOTES

Analysis

Amount of Restitution.
Failure to Comply.
Restitution Not Authorized.
"Victim."

Amount of Restitution.

Subdivision (a)(3)(A) of this section required that the amount of restitution defendant owed be determined by the preponderance of the evidence presented to the sentencing authority during the trial court's sentencing phase; however, no evidence was presented, only the incorrect recitation by the state of the amount of a dishonored check. Beqiri v. State, 94 Ark. App. 45, 224 S.W.3d 575 (2006).

Failure to Comply.

Order revoking defendant's suspended sentences pursuant to § 5-4-309(d) was overturned where the trial court erred in failing to consider whether defendant's failure to pay fines, costs, and restitution was excusable under subdivision (f)(3) of this section; there was evidence showing that defendant had only $60 left after monthly expenses. Phillips v. State, 101 Ark. App. 190, 272 S.W.3d 123 (2008).

Trial court had no jurisdiction to revoke defendant's suspended sentence because defendant owed no restitution at the end of his suspended sentence, and the trial court could not retain jurisdiction over him; defendant's child support was not to make good an actual economic loss of a victim of his failure to comply with the reporting requirements of the Sex and Child Offender Registration Act. Owens v. State, 2009 Ark. App. 532, — S.W.3d — (2009).

Father's suspended sentences for felony nonsupport and other crimes were properly revoked for failure to make restitution payments on child support arrearages where the father failed to pay even when employed as a cook, claimed health problems but admitted there was no disability, and submitted only a few job applications. Thompson v. State, 2009 Ark. App. 620, — S.W.3d — (2009).

While defendant was serving a suspended sentence for overdraft, theft of

property, theft by deception, and two counts of failure to appear, he failed to pay his court-ordered restitution of $82,000; while he made $620 per week as a truck driver, he had to pay $100 per week in daycare and $400 per month in child support. Defendant's child-support obligations constituted a special circumstance bearing on his ability to pay, as contemplated by this section; nonetheless, the trial court did not err by revoking his suspended sentence for the failure to pay child support, because he testified that he made partial payments due to his mistaken understanding as to the amount due. Reese v. State, 2009 Ark. App. 678, — S.W.3d — (2009).

Trial court erred in revoking defendant's probation for failure to pay a child support arrearage following a conviction for felony nonsupport in violation of § 5-26-401(a) and (b)(2)(B) where defendant asserted an inability to pay and offered a disability as a reasonable excuse for his nonpayment and where the state offered no evidence of defendant's other sources of income, his assets, or his expenses. The trial court should have applied the standard found at § 5-4-309(d), in that defendant inexcusably failed to comply, as refined by the restitution-specific factors in subsection (f) of this section. Hanna v. Arkansas, 2009 Ark. App. 809, — S.W.3d — (2009), review denied, Hanna v. State, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 93 (Feb. 12, 2010).

Judgment revoking appellant's probated sentence was affirmed where (1) despite appellant's attempt to excuse his failure to pay fines and restitution, the trial court found that appellant had committed a multitude of violations and that these violations specifically included a failure to make good-faith efforts to pay fines and restitution; and (2) there was evidence that appellant spent his money on something nonessential, alcohol, and this use of alcohol was also in violation of his terms of probation. Barringer v. State, 2010 Ark. App. 369, — S.W.3d — (2010), rehearing denied, — Ark. App. —, — S.W.3d —, 2010 Ark. App. LEXIS 513 (June 2, 2010).

Circuit court properly revoked defendant's suspended sentence, pursuant to § 5-4-309, for nonpayment of court costs and fines because the state introduced, without objection, a ledger sheet reflecting defendant's nonpayment and defendant did not have a reasonable excuse for failing to pay, pursuant to subdivision (f)(3) of this section; the state proved defendant's failure to pay was inexcusable. Burkhart v. State, 2010 Ark. App. 462, — S.W.3d — (2010).

Circuit court did not err in revoking the suspended sentence defendant received for second-degree forgery because the circuit court's finding that defendant's failure to pay restitution, a fine, and court costs was both willful and inexcusable was not clearly against the preponderance of the evidence; the circuit court could find that defendant was capable of working, that he was employed in some capacity, and that he received income from the government, and instead of meeting his financial obligations, defendant chose to spend money on nonessential items such as alcohol and cigarettes. Wicks v. State, 2010 Ark. App. 499, — S.W.3d — (2010).

Restitution Not Authorized.

Because the trial court lacked the authority to order restitution in a proceeding for revocation of a suspended sentence, pursuant to subdivision (a)(1) of this section, defendant's sentence was modified to delete the restitution provision. Otherwise, his ten-year sentence was affirmed. Simpson v. State, 2010 Ark. App. 33, — S.W.3d — (2010).

"Victim."

After defendant was convicted of four counts of cruelty to animals, a trial court properly ordered defendant to pay $5,091 in restitution to an equine humane society because the humane society was a victim under subdivision (c)(1) of this section; the humane society incurred monetary expense as a result of defendant's cruelty to horses when it cared for and obtained treatment for the horses following their seizure. Brown v. State, 375 Ark. 499, 292 S.W.3d 288 (2009).

Car's insurer, which was required to pay compensation to the owner of the car as an indirect result of defendant's crime of fleeing and theft by receiving the car after defendant wrecked the car, rendering it a total loss, was a "victim" and an "aggrieved party" entitled to restitution under this section and § 5-4-303. Singleton v. State, 2009 Ark. 594, — S.W.3d — (2009).

Subchapter 3 — Suspension or Probation

5-4-301. Crimes for which suspension or probation prohibited — Criteria for suspension or probation in other cases.

(a)(1) A court shall not suspend imposition of sentence as to a term of imprisonment or place a defendant on probation for the following offenses:

(A) Capital murder, § 5-10-101;

(B) Treason, § 5-51-201;

(C) A Class Y felony, except to the extent suspension of an additional term of imprisonment is permitted in § 5-4-104(c);

(D) Driving while intoxicated, § 5-65-103;

(E) Murder in the second degree, § 5-10-103, except to the extent suspension of an additional term of imprisonment is permitted in § 5-4-104(c); or

(F) Engaging in a continuing criminal enterprise, § 5-64-405.

(2) If it is determined pursuant to § 5-4-502 that a defendant has previously been convicted of two (2) or more felonies, the court shall not:

(A) Suspend imposition of sentence; or

(B) Place the defendant on probation.

(b) In making a determination as to suspension or probation, the court shall consider whether:

(1) There is undue risk that during the period of a suspension or probation the defendant will commit another offense;

(2) The defendant is in need of correctional treatment that can be provided most effectively by his or her commitment to an institution;

(3) Suspension or probation will discount the seriousness of the defendant's offense; or

(4) The defendant has the means available or is so gainfully employed that restitution or compensation to the victim of the defendant's offense will not cause an unreasonable financial hardship and will be beneficial to the rehabilitation of the defendant.

(c) While not controlling the discretion of the court, the following grounds shall be accorded weight in favor of suspension or probation:

(1) The defendant's conduct neither caused nor threatened serious harm;

(2) The defendant did not contemplate that his or her conduct would cause or threaten serious harm;

(3) The defendant acted under strong provocation;

(4) There was a substantial ground tending to excuse or justify the defendant's conduct, though failing to establish a defense;

(5) The victim of the offense induced or facilitated its commission;

(6) The defendant has compensated or will compensate the victim of the offense for the damage or injury that the victim sustained;

(7) The defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present offense;

(8) The defendant's conduct was the result of circumstances unlikely to recur;

(9) The character and attitude of the defendant indicate that he or she is unlikely to commit another offense;

(10) The defendant is particularly likely to respond affirmatively to suspension or probation;

(11) The imprisonment of the defendant would entail excessive hardship to the defendant or to a dependent of the defendant;

(12) The defendant is elderly or in poor health; or

(13) The defendant cooperated with law enforcement authorities in his or her own prosecution or in bringing another offender to justice.

(d)(1) When the court suspends the imposition of sentence on a defendant or places him or her on probation, the court shall enter a judgment of conviction only if the court sentences the defendant to:

(A) Pay a fine and suspends imposition of sentence as to imprisonment or places the defendant on probation; or

(B) A term of imprisonment and suspends imposition of sentence as to an additional term of imprisonment.

(2) The entry of a judgment of conviction does not preclude:

(A) The modification of the original order suspending the imposition of sentence on a defendant or placing a defendant on probation following a revocation hearing held pursuant to § 16-93-307; and

(B) A modification set within the limits of §§ 16-93-309 and 16-93-312.

History. Acts 1975, No. 280, § 1201; 1977, No. 474, §§ 2, 8; 1977, No. 482, § 2; A.S.A. 1947, § 41-1201; Acts 1991, No. 608, § 3; 1993, No. 192, § 2; 1999, No. 1569, § 1; 2009, No. 748, § 4; 2011, No. 570, § 6.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "Legislative intent. The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Amendments. The 2009 amendment substituted "§ 5-64-405" for "former § 5-64-414" in (a)(1)(F).

The 2011 amendment substituted "§ 16-93-307" for "§ 5-4-310" in (d)(2)(A); and substituted "§ 16-93-309 and § 16-93-312" for "§§ 5-4-303, 5-4-304, and 5-4-306" in (d)(2)(B).

CASE NOTES

Analysis

Court's Authority.
Modification.
Suspension of Sentence.

Court's Authority.

Since defendant pled guilty to a Class C felony as a habitual offender, the circuit court was required to sentence her in accordance with subdivision (a)(2) of this section and § 5-4-501(a)(2)(D), and the circuit court exceeded its statutory authority when it placed defendant on probation; defendant knew about the statute's sentencing range and, at the time of defendant's plea in open court, the circuit court expressly reiterated that her offense carried with it a sentencing range of three to twenty years' imprisonment. State v. Joslin, 364 Ark. 545, 222 S.W.3d 168 (2006).

Circuit court did not err in revoking defendant's suspended sentence and probation and in sentencing him to 197 months imprisonment with forty-seven months suspended because the circuit court was within its authority to revoke the original sentences and prescribe the resulting sentence and was also within its authority to run the prescribed sentences consecutively when the prescribed sentence in the first case, thirty months with an additional forty-seven months' suspended, was within the circuit court's authority; because defendant was convicted of a Class C felony, the circuit court could have originally sentenced him to ten years' imprisonment for failure to appear pursuant to § 5-4-401(a)(4), the sentence imposed as a result of revocation in the second case did not exceed the statutory maximum for the underlying offense and was not illegal on its face, and a notation on the judgment and disposition order in the second case was an insufficient basis for defendant's allegation that the circuit court unambiguously intended to impose a presumptive sentence of thirty-six months in the event he failed to comply with the conditions of his probation. Ward v. State, 2010 Ark. App. 79, — S.W.3d — (2010).

Modification.

Upon the revocation of defendant's probation for eight violations of the Arkansas Hot Check Law, the trial court was authorized under subdivision (d)(2) of this section and § 5-4-309(f)(1)(A) to modify the original order and impose multiple sentences of imprisonment to be served consecutively in accordance with § 5-4-403(a). The trial court did not err by sentencing defendant to twenty years in prison each on four hot-check counts to run consecutively and ten years in prison each on the other felony hot-check counts to run concurrently. Maldonado v. State, 2009 Ark. 432, — S.W.3d — (2009).

Suspension of Sentence.

There was no violation of appellant's due process rights for entitlement to habeas relief where appellant had been sentenced to five years' probation and fined for first-degree sexual abuse, a trial court properly sentenced him to 10 years in prison upon revocation of probation under § 5-4-309(f) because appellant could have originally received that term under §§ 5-14-108, 5-4-401(a)(4) and there had been no sentence imposed that had been improperly modified under §§ 5-4-301(d) (1997), or 16-93-402(e). Rickenbacker v. Norris, 361 Ark. 291, 206 S.W.3d 220 (2005).

Cited: Small v. State, 371 Ark. 244, 264 S.W.3d 512 (2007).

5-4-303. Conditions of suspension or probation.

(a) If a court suspends imposition of sentence on a defendant or places him or her on probation, the court shall attach such conditions as are reasonably necessary to assist the defendant in leading a law-abiding life.

(b) The court shall provide as an express condition of every suspension or probation that the defendant not commit an offense punishable by imprisonment during the period of suspension or probation.

(c) If the court suspends imposition of sentence on a defendant or places him or her on probation, as a condition of its order the court may require that the defendant:

(1) Support his or her dependents and meet his or her family responsibilities;

(2) Work faithfully at suitable employment;

(3) Pursue a prescribed secular course of study or vocational training designed to equip him or her for suitable employment;

(4) Undergo available medical or psychiatric treatment and enter and remain in a specified institution when required for medical or psychiatric treatment;

(5) Participate in a community-based rehabilitative program or work-release program that uses practices proven to reduce recidivism and for which the court may impose a reasonable fee or assessment on the defendant to be used in support of the community-based rehabilitative program or work-release program;

(6) Refrain from frequenting an unlawful or designated place or consorting with a designated person;

(7) Have no firearm in his or her possession;

(8) Make restitution to an aggrieved party in an amount the defendant can afford to pay for the actual loss or damage caused by his or her offense;

(9) Post a bond, with or without surety, conditioned on the performance of a prescribed condition; and

(10) Satisfy any other condition reasonably related to the rehabilitation of the defendant and not unduly restrictive of his or her liberty or incompatible with his or her freedom of conscience.

(d) If the court places a defendant on probation, as a condition of its order the court may require that the defendant:

(1) Report as directed to the court or the probation officer and permit the probation officer to visit the defendant at the defendant's place of employment or elsewhere;

(2) Remain within the jurisdiction of the court unless granted permission to leave by the court or the probation officer; and

(3) Answer any reasonable inquiry by the court or the probation officer and promptly notify the court or probation officer of any change in address or employment.

(e) If the court suspends imposition of sentence on a defendant or places him or her on probation, the defendant shall be given a written statement explicitly setting forth the conditions under which he or she is being released.

(f)(1) If the court suspends imposition of sentence on a defendant or places him or her on probation conditioned upon his or her making restitution under subdivision (c)(8) of this section, the court, by concurrence of the victim, defendant, and the prosecuting authority, shall determine the amount to be paid as restitution.

(2) After considering the assets, financial condition, and occupation of the defendant, the court shall further determine:

(A) Whether restitution shall be total or partial;

(B) The amounts to be paid if by periodic payments; and

(C) If a personal service is contemplated, the reasonable value and rate of compensation for the personal service rendered to the victim.

(g)(1) In a case in which counsel has been appointed to represent a defendant due to the defendant's indigency and the court suspends imposition of sentence or places a defendant on probation at the time of disposition, the court shall revisit the issue of the defendant's indigency.

(2)(A) When appropriate and when the defendant is financially able to do so, the court may assess an attorney's fee to be paid by the defendant as part of his or her suspension or probation.

(B) The amount of the assessed attorney's fee shall be commensurate with the defendant's ability to pay.

(C) The assessed attorney's fee shall be paid to the state as a means of partial reimbursement for providing appointed counsel.

(3) In no event is failure to pay an assessed attorney's fee, standing alone, a ground for the revocation of a suspension or probation.

(4)(A) The assessed attorney's fee under subdivision (g)(2) of this section shall be collected by the county or city official, agency, or department designated under § 16-13-709 as primarily responsible for the collection of fines assessed in a circuit court or district court of this state.

(B) On or before the tenth day of each month, the county or city official, agency, or department described in subdivision (g)(4)(A) of this section shall remit any assessed attorney's fee collected to the Arkansas Public Defender Commission on a form provided by the commission.

(C) The commission shall deposit the money collected into a separate account within the State Central Services Fund to be known as "Public Defender Attorney Fees" to be used solely to defray costs for the commission.

History. Acts 1975, No. 280, § 1203; 1977, No. 474, §§ 3, 9; 1977, No. 482, § 3; 1985, No. 315, § 1; A.S.A. 1947, § 41-1203; Acts 1989, No. 305, § 1; 1993, No. 119, § 1; 1997, No. 281, § 1; 1999, No. 231, § 1; 1999, No. 1564, § 6; 1999, No. 1569, § 2; 2003, No. 1765, § 1; 2011, No. 570, § 7.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "Legislative intent. The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Acts 2011, No. 1066, § 9, provided: "Unless specified otherwise in Arkansas Code §5-4-303(g) and Arkansas Code 16-87-213 the monies collected by the courts under the authority of §5-4-303(g) and 16-87-213 shall be deposited into the State Treasury to the credit of the State Central Services Fund.

"In the event that the law requires that the fees levied under §5-4-303(g) be deposited into the State Administration of Justice Fund, the State Treasurer shall transfer the amount of the fees collected each month under the authority of Arkansas Code §5-4-303(g) from the State Administration of Justice Fund to the State Central Services Fund.

"The provisions of this section shall be in effect only from July 1, 2011 through June 30, 2012."

Amendments. The 2011 amendment substituted "uses practices proven to reduce recidivism" for "meets the minimum state standards for certification" in (c)(5); deleted former (d), (f) and (j) and redesig-

nated the remaining subsections accordingly; and rewrote present (f).

RESEARCH REFERENCES

ALR. Propriety of Requirement, as Condition of Probation, That Defendant Refrain from Use of Intoxicants. 46 A.L.R.6th 241.

CASE NOTES

Analysis

Modification.
No Cause for Revocation.
Rehabilitation Program.
Restitution or Reparation.
Sentence Upon Revocation of Suspension.
Statement of Conditions.
Validity of Conditions.
Written Notice.

Modification.

Trial court lacked authority, pursuant to subdivision (d)(2) of this section, to lengthen defendant's probationary period where defendant had made progress in the drug-court program under the Drug Court Act, § 16-98-301 et seq., because the trial court did not hold a revocation hearing pursuant to § 5-4-310. Cross v. State, 2009 Ark. 597, — S.W.3d — (2009).

No Cause for Revocation.

Trial court had no jurisdiction to revoke defendant's suspended sentence, because defendant owed no restitution at the end of his suspended sentence, and the trial court could not retain jurisdiction over him; defendant's child support was not to make good an actual economic loss of a victim of his failure to comply with the reporting requirements of the Sex and Child Offender Registration Act. Owens v. State, 2009 Ark. App. 532, — S.W.3d — (2009).

Rehabilitation Program.

Trial court properly revoked defendant's suspended sentence for sexual abuse and sentenced defendant to six years in prison because it was undisputed that defendant never completed the Arkansas Reduction of Sexual Victimization Program, which was a condition of the suspended sentence pursuant to subsection (g) of this section. Seamster v. State, 2009 Ark. 258, 308 S.W.3d 567 (2009), rehearing denied, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 425 (June 18, 2009).

Restitution or Reparation.

Car's insurer, which was required to pay compensation to the owner of the car as an indirect result of defendant's crime of fleeing and theft by receiving the car after defendant wrecked the car, rendering it a total loss, was a "victim" and an "aggrieved party" entitled to restitution under § 5-4-205 and this section. Singleton v. State, 2009 Ark. 594, — S.W.3d — (2009).

Sentence Upon Revocation of Suspension.

When defendant was serving a suspended sentence for overdraft, theft of property, theft by deception, and two counts of failure to appear, he failed to pay his court-ordered restitution of $82,000; the trial court did not err by revoking his suspended sentence. While this section permitted the trial court to fashion an alternative remedy that did not involve incarceration, the trial court sentenced defendant to ten years in the Arkansas Department of Correction. Reese v. State, 2009 Ark. App. 678, — S.W.3d — (2009).

Statement of Conditions.

Decision to revoke probation due to a probationer's failure to comply with conditions was proper because written conditions were provided probationer as required by subsection (g) of this section; there was evidence that the conditions were expressly communicated in writing and verbally to the probationer; and there was no evidence of confusion on the probationer's part. White v. State, 2010 Ark. App. 157, — S.W.3d — (2010).

Validity of Conditions.

In a case dealing with domestic offenses, although the jury was permitted to recommend an alternative sentence under § 16-97-101(4), the trial court had the discretion as to whether to impose it; thus, the trial court was permitted to accept a

jury's recommended alternative sentences of probation and suspended sentences and then impose fines as a condition of those sentences, pursuant to this section. Sullivan v. State, 366 Ark. 183, 234 S.W.3d 285 (2006).

Written Notice.

Revocation of probation on forgery and battery charges was proper because probationer's signature on the documents listing the conditions of probation was sufficient to support the trial court's determination that the probationer had been provided the conditions, pursuant to subsection (g) of this section, and knew, understood, and consented to the conditions. Berry v. State, 2010 Ark. App. 217, — S.W.3d — (2010).

5-4-304. Confinement as condition of suspension or probation.

(a) If a court suspends the imposition of sentence on a defendant or places him or her on probation, the court may require as an additional condition of its order that the defendant serve a period of confinement in the county jail, city jail, or other authorized local detention, correctional, or rehabilitative facility at any time or consecutive or nonconsecutive intervals within the period of suspension or probation as the court shall direct.

(b) An order that the defendant serve a period of confinement as a condition of suspension or probation is not deemed a sentence to a term of imprisonment, and a court does not need to enter a judgment of conviction before imposing a period of confinement as a condition of suspension or probation.

(c)(1)(A) The period actually spent in confinement pursuant to this section in a county jail, city jail, or other authorized local detention, correctional, or rehabilitative facility shall not exceed:

(i) One hundred twenty (120) days in the case of a felony; or

(ii) Thirty (30) days in the case of a misdemeanor.

(B) In the case of confinement to a facility in the Department of Community Correction, the period actually spent in confinement under this section shall not exceed three hundred sixty-five (365) days.

(2) For purposes of this subsection, any part of a twenty-four-hour period spent in confinement constitutes a day of confinement.

History. Acts 1975, No. 280, § 1204; A.S.A. 1947, § 41-1204; Acts 1993, No. 532, § 6; 1993, No. 550, § 6; 1999, No. 1569, § 3; 2003, No. 1742, § 1; 2005, No. 1443, § 1; 2011, No. 570, § 8.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "Legislative intent. The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Amendments. The 2011 amendment substituted "detention" for "detentional" in (a) and (c)(1)(A); and, deleted former (c) and (e) and redesignated the remaining subsections accordingly.

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Survey of Legislation, 2005 Arkansas General Assembly, Criminal Law, 28 U. Ark. Little Rock L. Rev. 335.

CASE NOTES

Analysis

Illegal Sentence.
Imprisonment and Probation or Suspension.

Illegal Sentence.

Defendant's sentence was illegal where the version of this section effective when defendant committed the crime limited time served as a condition of probation to one hundred twenty days in confinement; the trial court erred in amending defendant's probation to include a year in a Regional Punishment Facility. Scissom v. State, 367 Ark. 368, 240 S.W.3d 100 (2006).

Imprisonment and Probation or Suspension.

Trial court erred in imposing additional confinement as a condition of defendant's probation because subsection (d) of this section, which was in effect when the underlying offense was committed, did not allow additional time if a period of confinement had been included in the original order. Scissom v. State, 94 Ark. App. 452, 232 S.W.3d 502 (2006), aff'd in part, reversed in part, 367 Ark. 368, 240 S.W.3d 100 (2006).

Cited: Richie v. State, 2009 Ark. 602, — S.W.3d — (2009).

5-4-306. Time period generally.

If a court suspends imposition of sentence on a defendant or places him or her on probation, the period of suspension or probation shall be for a definite period of time not to exceed the maximum jail or prison sentence allowable for the offense charged.

History. Acts 1975, No. 280, § 1205; 1977, No. 772, § 1; A.S.A. 1947, § 41-1205; Acts 1999, No. 1569, § 4; 2011, No. 570, § 9.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "Legislative intent. The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Amendments. The 2011 amendment deleted "Modification" from the end of the section heading; and deleted (a)(2) and (b).

5-4-307. Time period — Calculation.

CASE NOTES

Commencement of Sentence.

Trial court did not lack jurisdiction to revoke defendant's suspended sentence on the ground that defendant failed to complete the Arkansas Reduction of Sexual Victimization Program (RSVP) as the conduct did not occur prior to the suspended sentence; the judgment and commitment order imposed a six-year term of imprisonment to be served concurrently with the 10-year suspended sentence, as required by subdivision (b)(2) of this section. Seamster v. State, 2009 Ark. 258, 308 S.W.3d 567 (2009), rehearing denied, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 425 (June 18, 2009).

Cited: Donovan v. State, 95 Ark. App. 378, 237 S.W.3d 484 (2006).

5-4-308. [Repealed.]

Publisher's Notes. This section, concerning transfer of jurisdiction, was repealed by Acts 2011, No. 570, § 10. The section was derived from Acts 1975, No. 280, § 1207; A.S.A. 1947, § 41-1207.

5-4-309. [Repealed.]

Publisher's Notes. This section, concerning violation of conditions — arrest, revocation and sentencing, was repealed by Acts 2011, No. 570, § 11. The section was derived from Acts 1975, No. 280, § 1208; A.S.A. 1947, § 41-1208; Acts 1999, No. 847, § 1; 2003, No. 841, § 1; 2005, No. 1534, § 1; 2009, No. 633, § 3.

5-4-310. [Repealed.]

Publisher's Notes. This section, concerning revocation hearings, was repealed by Acts 2011, No. 570, § 12. The section was derived from Acts 1975, No. 280, § 1209; A.S.A. 1947, § 41-1209.

5-4-311. [Repealed.]

Publisher's Notes. This section, concerning discharge and dismissal, was repealed by Acts 2011, No. 570, § 13. The section was derived from Acts 1975, No. 280, § 1210; 1977, No. 474, § 10; A.S.A. 1947, § 41-1210; Acts 1995, No. 998, § 1; 1999, No. 1407, § 2.

5-4-312. Presentence investigation — Placement in a community correction program.

(a)(1) A court may require that either a presentence investigation be conducted by either the probation officer or presentence investigation officer assigned to the court or that the defense counsel of a defendant, the prosecuting attorney, a probation officer, and other persons whom the court believes have information relevant to the sentencing of the defendant submit to the court the information in writing prior to sentencing.

(2) The presentence investigation or information submitted by the persons described in subdivision (a)(1) of this section shall be forwarded with the commitment order to the circuit clerk and retained in the defendant's case file.

(b) Upon determination by a court that a defendant is an eligible offender and that placement in a community correction program under § 16-93-1201 et seq. is proper, the court may:

(1)(A) Suspend the imposition of the sentence or place the defendant on probation, under §§ 5-4-104, 5-4-201 et seq., 5-4-301 — 5-4-307, and 16-93-314.

(B) A sentence under subdivision (b)(1)(A) of this section may be accompanied by assignment to a community correction program under § 16-93-1201 et seq. for a designated period of time commensurate with the goals of the community correction program assignment and the rules established by the Board of Corrections for the operation of community correction programs.

(C) The court shall maintain jurisdiction over the defendant sentenced under subdivision (b)(1)(A) of this section with supervision outside the confines of the specific programming provided by probation officers assigned to the court.

(D)(i) If a person sentenced under subdivision (b)(1)(A) of this section violates any term or condition of his or her sentence or term of probation, revocation of the sentence or term of probation shall be consistent with the procedures established by law for the revocation of suspended imposition of sentence or probation.

(ii) Upon revocation as described in subdivision (b)(1)(D)(i) of this section, the court shall determine whether the defendant shall remain under the jurisdiction of the court and be assigned to a more restrictive community correction program, facility, or institution for a period of time or committed to the Department of Correction.

(iii) If the defendant is committed to the Department of Correction under subdivision (b)(1)(D)(ii) of this section, the court shall specify if the commitment is for judicial transfer of the offender to the Department of Community Correction or is a commitment to the Department of Correction; or

(2)(A) Commit the defendant to the custody of the Department of Correction for judicial transfer to the Department of Community Correction subject to the following:

(i) That the sentence imposed provides that the defendant shall not serve more than two (2) years of confinement, with credit for meritorious good time, with initial placement in a Department of Community Correction facility; and

(ii) That the initial placement in the Department of Community Correction facility is conditioned upon the defendant's continuing eligibility for Department of Community Correction placement and the defendant's compliance with all applicable rules established by the board for community correction programs.

(B) Post-prison supervision of the defendant shall accompany and follow the community correction program when appropriate.

(c) A defendant may not be excluded from placement in a community correction program under this section based solely on the defendant's inability to speak, read, write, hear, or understand English.

History. Acts 2011, No. 570, § 14.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "Legislative intent. The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

5-4-313. Placement in a drug treatment program — Drug court alternative.

If a judicial district has one (1) or more of the following programs in place at the time of a defendant's sentencing for a felony, a court may sentence the defendant to:

(1) A posttrial treatment program for drug abuse under § 16-98-201; or

(2) Drug court under the Arkansas Drug Court Act, § 16-98-301 et seq.

History. Acts 2011, No. 570, § 14.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "Legislative intent. The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

5-4-323. Additional conditions — High school diploma or general education development certificate — Employment training.

(a)(1) As an additional requirement for suspension of sentence or probation, a court may require any person who is sentenced for a felony or a Class A misdemeanor to make a good faith effort toward completion of a high school diploma or a general education development certificate unless the person has already achieved a high school diploma or a general education development certificate.

(2) The additional requirement under subdivision (a)(1) of this section shall be implemented only:

(A) After the appropriate school or adult education program has received notice from the court at least ten (10) working days prior to the person's making application to enroll so as to allow a school or adult education program official to review the person's educational records; and

(B) Upon the acceptance of the person by the administrative head of the school or adult education program.

(3) If no appropriate school or adult education program can be found, the additional requirement under subdivision (a)(1) of this section is of no effect.

(4) In the alternative, the court may allow the defendant to pursue a prescribed course of study or vocational training approved by the court that is designed to equip him or her for suitable employment.

(5)(A) After consultation with the school or the adult education program, the court shall determine the appropriate documentation for a person participating under a provision of this section and shall report any documentation of school or adult education program participation on a quarterly basis to the Administrative Office of the Courts.

(B) The office shall then report to the Department of Career Education.

(b)(1) Unless the person is employed or has a skill that will facilitate immediate employment, the court may require any person sentenced for a felony or a Class A misdemeanor to make a good faith effort toward obtaining gainful employment by participating in an appropriate employment training program as an additional requirement for suspension of sentence or probation.

(2)(A) The additional requirement under subdivision (b)(1) of this section shall be implemented by the person's reporting to the local workforce center for registration, intake, and employability skills assessment.

(B) If the person is on probation, the additional requirement under subdivision (b)(1) of this section shall be accomplished in conjunction with the probation officer.

(C) In addition to the employability skills assessment, the person shall register for employment with the local workforce center and upon obtaining employment shall communicate the event to the:

(i) Court if on suspension of sentence; or

(ii) Probation officer if on probation.

(c) As used in this section, "good faith effort" means a person:

(1) Has been enrolled in a program of instruction leading to a high school diploma or a general education development certificate and is attending a school or an adult education course; or

(2) Is registered for employment and enrolled and participating in an employment-training program with the purpose of obtaining gainful employment.

(d) A person who fails to make a good faith effort to comply with a court order issued under this section upon conviction is guilty of a violation and shall be punished by a fine of at least one hundred dollars ($100) but not more than one thousand dollars ($1,000).

History. Acts 1991, No. 857, § 1; 1993, No. 343, § 1; 1993, No. 1267, § 1; 1994 (2nd Ex. Sess.), No. 30, § 4; 1994 (2nd Ex. Sess.), No. 31, § 4; 1999, No. 1323, § 2; 2003, No. 1006, § 1; 2007, No. 827, § 14; 2011, No. 570, §§ 15–17.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "Legislative intent. The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Amendments. The 2007 amendment, in (e), added "Upon conviction," substituted "a violation" for "an unclassified misdemeanor," and made a related change.

The 2011 amendment deleted former (c) and redesignated the remaining subsections accordingly; substituted "As used in this section, 'Good faith effort'" for "'A good faith effort'" in the introductory paragraph of (c).

Subchapter 4 — Imprisonment

SECTION.

5-4-401. Sentence.

CASE NOTES

Analysis

In General.

Granting of the inmate's petition for postconviction relief was inappropriate because the circuit court failed to make the required finding under Strickland's prejudice prong since a defendant who received a sentence less than the maximum sentence for the offense could not

show prejudice from the sentence itself. The maximum sentence that the inmate could have received for the offense of first-degree battery was 20 years and a $15,000 fine; she received 180 months in prison and a fine of $7,500. State v. Smith, 368 Ark. 620, 249 S.W.3d 119 (2007).

Construction.

While it is true that a term of zero years in prison or a fine of zero dollars are, strictly speaking, no imprisonment and no fine, the terms "up to" and "not exceeding," as used in Ark. Code Ann. § 5-4-401(a)(5), includes zero when no lower limit is set. Because courts strictly construe criminal statutes and resolve any doubt in favor of the defendant, it only follows that a sentencing range which allows for a term of imprisonment "up to" a set number of years or a fine "not exceeding" a set amount includes zero. Donaldson v. State, 370 Ark. 3, 257 S.W.3d 74 (2007).

Attempted Capital Murder.

During a trial for attempted first-degree murder, defendant was not entitled to a mistrial based on the prosecutor's questions to a witness during the sentencing phase of the trial about blood stains on the bridge; defendant failed to request a cautionary instruction. He could not show prejudice, because his twenty-eight-year sentence was within the statutory range set forth in subdivision (a)(2) of this section for a Class A felony and less than the maximum sentence within the statutory range. Jones v. State, 2009 Ark. App. 135, — S.W.3d — (2009).

Due Process.

Because defendant was unable to show that he was prejudiced by his 40 year sentence for first-degree murder, as it was less than the maximum possible sentence for his conviction, the court did not consider his claim that his due process rights were violated by the admission of a photographic history of the victim's life during sentencing. Tate v. State, 367 Ark. 576, 242 S.W.3d 254 (2006).

Modification of Sentence.

Although defendant's Class C felony conviction for theft by receiving in excess of $500.00 could not stand, defendant did not challenge the sufficiency of the evidence showing that he was generally guilty of theft by receiving and, as the value of the stolen generator was at most $499.99, defendant still stood convicted of a Class A misdemeanor; accordingly, his conviction was modified to reflect the maximum sentence for a Class A misdemeanor of one year, with credit for any time defendant had already served. Russell v. State, 367 Ark. 557, 242 S.W.3d 265 (2006).

Upon the revocation of defendant's probation for eight violations of the Arkansas Hot Check Law, the trial court was authorized under §§ 5-4-301(d)(2) and 5-4-309(f)(1)(A) to modify the original order and impose multiple sentences of imprisonment to be served consecutively in accordance with Ark. Code Ann. § 5-4-403(a). The trial court did not err by sentencing defendant to twenty years in prison each on four hot-check counts to run consecutively and ten years in prison each on the other felony hot-check counts to run concurrently; the sentences were within the parameters authorized for multiple felony convictions under this section. Maldonado v. State, 2009 Ark. 432, — S.W.3d — (2009).

Postconviction Proceedings.

Where appellant entered negotiated pleas of guilty to kidnapping under § 5-11-102 and additional charges, he was sentenced to 120 months' in prison with an additional 120-month suspended sentence; appellant was not entitled to postconviction relief under Ark. R. Crim. P. 37.1, because he could not prove that counsel failed to advise him of a possible life sentence under this section. On the record, counsel indicated that he had advised appellant that he could be subject to a life sentence if he violated the terms of the suspended sentence. French v. State, 2009 Ark. 443, — S.W.3d — (2009).

Prejudice.

Defendant failed to show prejudice resulting from the admissibility of his juvenile criminal record at sentencing because defendant could have been sentenced to a total of 30 years, but was sentenced to 12 years' imprisonment, followed by 18 years' suspended imposition of sentence; therefore, defendant received a sentence short of the maximum sentence and was not prejudiced from the sentence itself. Johnson v. State, 2010 Ark. App. 606, —

S.W.3d — (2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 486 (Oct. 21, 2010).

Propriety of Sentence.

Subdivision (a)(1) of this section authorized a sentence of ten to forty years or life in prison for a Class Y felony, which rape was considered to be, and § 5-4-403(a) allowed a court to impose consecutive sentences for multiple convictions; thus, defendant's sentence was not unduly harsh. Simmons v. State, 95 Ark. App. 114, 234 S.W.3d 321 (2006).

Trial court's decision to permit the introduction of evidence relating to defendant's criminal history during the sentencing phase of his trial was consistent with the mandates of § 16-97-103; at sentencing, under subdivision (a)(1) of this section, defendant was subjected to the normal ranges of Class A and Y felonies as opposed to the enhanced ranges designated for habitual offenders. Defendant actually received the minimum sentences allowed on two of his four convictions and less than the maximum on the other two and, under § 5-4-403, his sentences were ordered to run concurrently rather than consecutively, as they could have; thus, defendant not only failed to establish a threshold evidentiary error supporting reversal, but he also failed to show that he suffered prejudice during sentencing. Wilson v. State, 100 Ark. App. 14, 262 S.W.3d 628 (2007).

Trial judge did not err in denying defendant's motion to recuse on the ground that the judge knew his fiancee's parents because defendant failed to show bias; defendant's 20-year sentences for two counts of possession of methamphetamine with intent to deliver did not include a possession of drug paraphernalia conviction for which defendant could have received up to 20 years in prison under subdivision (3) of this section and § 5-64-403(c)(5)(A). Rudd v. State, 2010 Ark. App. 784, — S.W.3d — (2010).

Suspension or Probation.

Trial court erred in imposing a 10-year sentence for defendant's terroristic threatening conviction after his probation was revoked because the terroristic threatening conviction was a Class D felony and was punishable by a maximum sentence of six years' imprisonment. Turner v. State, 88 Ark. App. 40, 194 S.W.3d 225 (2004), overruled in part, Bush v. State, 90 Ark. App. 373, 206 S.W.3d 268 (2005).

Where appellant had been sentenced to five years' probation and fined for first-degree sexual abuse, a trial court properly sentenced him to 10 years in prison upon revocation of probation under § 5-4-309(f) because appellant could have originally received that term under §§ 5-14-108, 5-4-401(a)(4) and there had been no sentence imposed that had been improperly modified under §§ 5-4-301(d) (1997), or 16-93-402(e). Rickenbacker v. Norris, 361 Ark. 291, 206 S.W.3d 220 (2005).

Circuit court did not err in revoking defendant's suspended sentence and probation and in sentencing him to 197 months imprisonment with forty-seven months suspended because the circuit court was within its authority to revoke the original sentences and prescribe the resulting sentence and was also within its authority to run the prescribed sentences consecutively when the prescribed sentence in the first case, thirty months with an additional forty-seven months' suspended, was within the circuit court's authority; because defendant was convicted of a Class C felony, the circuit court could have originally sentenced him to ten years' imprisonment for failure to appear pursuant to subdivision (a)(4) of this section, the sentence imposed as a result of revocation in the second case did not exceed the statutory maximum for the underlying offense and was not illegal on its face, and a notation on the judgment and disposition order in the second case was an insufficient basis for defendant's allegation that the circuit court unambiguously intended to impose a presumptive sentence of thirty-six months in the event he failed to comply with the conditions of his probation. Ward v. State, 2010 Ark. App. 79, — S.W.3d — (2010).

Unauthorized Sentence.

Trial court imposed an illegal sentence when it rejected a jury's verdict and took it upon itself to sentence defendant where the jury's sentencing verdict of zero years in prison and a fine of zero dollars was a proper and valid sentence for second-degree battery under Ark. Code Ann. § 5-4-401(a)(5). Donaldson v. State, 370 Ark. 3, 257 S.W.3d 74 (2007).

Writ of Habeas Corpus Denied.

Denial of writ of habeas corpus was affirmed because the inmate failed to state a cognizable claim when he did not dispute that the sentences were within the range set in this section, and he was well informed as to the nature of the charges and the range of punishment those charges carried pursuant to his negotiated guilty pleas. Anderson v. Norris, 370 Ark. 110, 257 S.W.3d 540 (2007).

Cited: Jester v. State, 367 Ark. 249, 239 S.W.3d 484 (2006); Small v. State, 371 Ark. 244, 264 S.W.3d 512 (2007); Ward v. State, 2010 Ark. App. 79, — S.W.3d — (2010); Reed v. State, 2011 Ark. 115, — S.W.3d — (2011).

5-4-402. Place of imprisonment.

(a) Except as provided in §§ 5-4-304 and 16-93-708, a defendant convicted of a felony and sentenced to imprisonment shall be committed to the custody of the Department of Correction for the term of his or her sentence or until released in accordance with law.

(b) Except as provided in § 16-93-708, a defendant convicted of a misdemeanor and sentenced to imprisonment shall be committed to the county jail or other authorized institution designated by the court for the term of his or her sentence or until released in accordance with law.

(c) Except as provided in § 5-4-304 or § 16-93-708, a defendant convicted of a felony violation of § 5-64-419 — § 5-64-442 and sentenced to imprisonment shall be committed to the custody of the Department of Correction for the term of his or her sentence or until released in accordance with law.

(d)(1)(A) A juvenile sentenced in circuit court who is less than sixteen (16) years of age when sentenced shall be committed to the custody of the Division of Youth Services of the Department of Human Services until his or her sixteenth birthday, at which time he or she shall be transferred to the Department of Correction, except as provided by court order or parole decision made by the Parole Board.

(B) Any record from the division shall be transferred to the Department of Correction at the time the juvenile is transferred.

(2) A juvenile less than sixteen (16) years of age who is awaiting transfer to the Department of Correction shall be segregated from the general delinquency population housed at the division.

(e)(1) With the consent and approval of the division, the Department of Correction may transfer from the Department of Correction to the division any inmate less than eighteen (18) years of age who, in the opinion of the Department of Correction and the division, is more suited and adaptable by age, physical size, and temperament to a program of the Department of Human Services.

(2)(A) An inmate transferred to the division shall be segregated from the general delinquency population housed at the division.

(B) If an inmate violates a rule of the division's program or facility or is otherwise not amenable to the division's rehabilitative effort, the division may return the inmate to the Department of Correction.

(3) Any inmate transferred to the division under this subsection shall be returned to the Department of Correction on the inmate's eighteenth birthday.

History. Acts 1975, No. 280, § 902; 1985, No. 982, § 1; A.S.A. 1947, § 41-902; Acts 1999, No. 1192, § 11; 2001, No. 559, § 9; 2005, No. 680, § 2; 2011, No. 570, § 18; 2011, No. 1120, § 4.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "Legislative intent. The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Amendments. The 2011 amendment by No. 570, in (c), inserted "§ 5-4-304 or" and "felony," and substituted "§ 5-64-419 — § 5-64-442 and sentenced to imprisonment" for "§ 5-64-401."

The 2011 amendment by No. 1120 deleted "5-4-203" preceding "§ 5-4-304" in (a).

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Survey of Legislation, 2005 Arkansas General Assembly, Criminal Law, 28 U. Ark. Little Rock L. Rev. 335.

5-4-403. Multiple sentences — Concurrent and consecutive terms.

RESEARCH REFERENCES

ALR. Construction and Application of U.S.S.G. § 5G1.3(b), Requiring Federal Sentence to Run Concurrently to Undischarged State Sentence When State Sentence Has Been Fully Taken into Account in Determining Offense Level for Federal Offense — Particular Events Preceding Federal Sentence and Sentencing Credit. 32 A.L.R. Fed. 2d 178.

CASE NOTES

Analysis

Consecutive Sentences.
Discretion of Court.

Consecutive Sentences.

Section 5-4-401(a)(1) authorized a sentence of ten to forty years or life in prison for a Class Y felony, which rape was considered to be, and this section allowed a court to impose consecutive sentences for multiple convictions; thus, defendant's sentence was not unduly harsh. Simmons v. State, 95 Ark. App. 114, 234 S.W.3d 321 (2006).

Consecutive sentences under subsection (a) of this section were improper in a case where a trial judge relied upon the record of codefendants and rejected a jury's recommendation of nonconsecutive sentences; the trial court was not allowed to take judicial notice of the court records, as they were not introduced into evidence. Throneberry v. State, 102 Ark. App. 17, 279 S.W.3d 489 (2008), review denied, — Ark. —, — S.W.3d —, 2008 Ark. LEXIS 563 (Sept. 4, 2008), superseded, 2009 Ark. 507, — S.W.3d — (2009).

Upon the revocation of defendant's probation for eight violations of the Arkansas Hot Check Law, the trial court was authorized under §§ 5-4-301(d)(2) and 5-4-309(f)(1)(A) to modify the original order and impose multiple sentences of imprisonment to be served consecutively in accordance with subsection (a) of this section. The trial court did not err by sentencing defendant to twenty years in prison each on four hot-check counts to run consecutively and ten years in prison each on the other felony hot-check counts to run concurrently. Maldonado v. State, 2009 Ark. 432, — S.W.3d — (2009).

Pursuant to subsection (a) of this section, the circuit court did not abuse its discretion in ordering defendant's sentences to run consecutively where the trial court expressly stated that it was relying on the testimony presented in defendant's case and was not considering the evidence from the other two trials. Throneberry v. State, 2009 Ark. 507, — S.W.3d — (2009).

Discretion of Court.

Imposition of consecutive sentences was not in violation of defendant's due process

rights or the Eighth Amendment to the U.S. Constitution where the trial judge noted that the sentences imposed on each count were less than the maximum and that the approach was consistent with other jury sentences in the country; the trial judge clearly exercised discretion in accepting the jury's recommendation. Ford v. State, 99 Ark. App. 119, 257 S.W.3d 560 (2007).

Trial court's decision to permit the introduction of evidence relating to defendant's criminal history during the sentencing phase of his trial was consistent with the mandates of § 16-97-103; at sentencing, under § 5-4-401(a)(1), defendant was subjected to the normal ranges of Class A and Y felonies as opposed to the enhanced ranges designated for habitual offenders. Defendant actually received the minimum sentences allowed on two of his four convictions and less than the maximum on the other two and, under this section, his sentences were ordered to run concurrently rather than consecutively, as they could have; thus, defendant not only failed to establish a threshold evidentiary error supporting reversal, but he also failed to show that he suffered prejudice during sentencing. Wilson v. State, 100 Ark. App. 14, 262 S.W.3d 628 (2007).

Cited: Gines v. State, 2009 Ark. App. 628, — S.W.3d — (2009).

5-4-404. Credit for time spent in custody.

RESEARCH REFERENCES

ALR. Defendant's Right to Credit for Time Spent in Halfway House, Rehabilitation Center, or Similar Restrictive Environment as Condition of Pretrial Release. 46 A.L.R.6th 63.

CASE NOTES

Entitlement to Credit.

Where appellant did not complete drug court, he was required to serve a six-year sentence for forgery and a ten-year suspended sentence for theft. Under § 5-4-404, he was entitled to 53 days credit for the time he spent in jail before he entered drug court; appellant was not entitled to credit for the time that his case was in drug court. Laxton v. State, 99 Ark. App. 1, 256 S.W.3d 518 (2007).

Subchapter 5 — Extended Term of Imprisonment

SECTION.
5-4-501. Habitual offenders — Sentencing for felony.

5-4-501. Habitual offenders — Sentencing for felony.

(a)(1) A defendant meeting the following criteria may be sentenced to pay any fine authorized by law for the felony conviction and to an extended term of imprisonment as set forth in subdivision (a)(2) of this section:

(A) A defendant who:

(i) Is convicted of a felony other than those enumerated in subsections (c) and (d) of this section committed after June 30, 1993; and

(ii) Has previously been convicted of more than one (1) felony but fewer than four (4) felonies or who has been found guilty of more than one (1) but fewer than four (4) felonies;

(B) A defendant who:

(i) Is convicted of any felony enumerated in subsection (c) of this section committed after August 31, 1997; and

(ii) Has previously been convicted of more than one (1) felony but fewer than four (4) felonies not enumerated in subsection (c) of this section or who has been found guilty of more than one (1) but fewer than four (4) felonies not enumerated in subsection (c) of this section; or

(C) A defendant who:

(i) Is convicted of any felony enumerated in subsection (d) of this section committed after August 31, 1997; and

(ii) Has previously been convicted of more than one (1) felony but fewer than four (4) felonies not enumerated in subsection (d) of this section or has been found guilty of more than one (1) but fewer than four (4) felonies not enumerated in subsection (d) of this section.

(2) The extended term of imprisonment for a defendant described in subdivision (a)(1) of this section is as follows:

(A) For a conviction of a Class Y felony, a term of imprisonment of not less than ten (10) years nor more than sixty (60) years, or life;

(B) For a conviction of a Class A felony, a term of imprisonment of not less than six (6) years nor more than fifty (50) years;

(C) For a conviction of a Class B felony, a term of imprisonment of not less than five (5) years nor more than thirty (30) years;

(D) For a conviction of a Class C felony, a term of imprisonment of not less than three (3) years nor more than twenty (20) years;

(E) For a conviction of a Class D felony, a term of imprisonment of not more than twelve (12) years;

(F) For a conviction of an unclassified felony punishable by less than life imprisonment, a term of imprisonment not more than five (5) years more than the maximum sentence for the unclassified felony; and

(G) For a conviction of an unclassified felony punishable by life imprisonment, a term of imprisonment not less than ten (10) years nor more than fifty (50) years, or life.

(b)(1) A defendant meeting the following criteria may be sentenced to pay any fine authorized by law for the felony conviction and to an extended term of imprisonment as set forth in subdivision (b)(2) of this section:

(A) A defendant who:

(i) Is convicted of a felony other than a felony enumerated in subsections (c) and (d) of this section committed after June 30, 1993; and

(ii) Has previously been convicted of four (4) or more felonies or who has been found guilty of four (4) or more felonies;

(B) A defendant who:

(i) Is convicted of any felony enumerated in subsection (c) of this section committed after June 30, 1997; and

(ii) Has previously been convicted of four (4) or more felonies not enumerated in subsection (c) of this section or who has been found

guilty of four (4) or more felonies not enumerated in subsection (c) of this section; or

(C) A defendant who:

(i) Is convicted of any felony enumerated in subsection (d) of this section committed after June 30, 1997; and

(ii) Has previously been convicted of four (4) or more felonies not enumerated in subsection (d) of this section or who has been found guilty of four (4) or more felonies not enumerated in subsection (d) of this section.

(2) The extended term of imprisonment for a defendant described in subdivision (b)(1) of this section is as follows:

(A) For a conviction of a Class Y felony, a term of imprisonment of not less than ten (10) years nor more than life;

(B) For a conviction of a Class A felony, a term of imprisonment of not less than six (6) years nor more than sixty (60) years;

(C) For a conviction of a Class B felony, a term of imprisonment of not less than five (5) years nor more than forty (40) years;

(D) For a conviction of a Class C felony, a term of imprisonment of not less than three (3) years nor more than thirty (30) years;

(E) For a conviction of a Class D felony, a term of imprisonment of not more than fifteen (15) years;

(F) For a conviction of an unclassified felony punishable by less than life imprisonment, a term of imprisonment not more than two (2) times the maximum sentence for the unclassified felony offense; and

(G) For a conviction of an unclassified felony punishable by life imprisonment, a term of imprisonment not less than ten (10) years nor more than fifty (50) years, or life.

(c)(1) Except as provided in subdivision (c)(3) of this section, a defendant who is convicted of a serious felony involving violence enumerated in subdivision (c)(2) of this section and who previously has been convicted of one (1) or more of the serious felonies involving violence enumerated in subdivision (c)(2) of this section may be sentenced to pay any fine authorized by law for the serious felony involving violence conviction and shall be sentenced:

(A) To imprisonment for a term of not less than forty (40) years nor more than eighty (80) years, or life; and

(B) Without eligibility for parole or community correction transfer except under § 16-93-615.

(2) As used in this subsection, "serious felony involving violence" means:

(A) Any of the following felonies:

(i) Murder in the first degree, § 5-10-102;

(ii) Murder in the second degree, § 5-10-103;

(iii) Kidnapping, § 5-11-102, involving an activity making it a Class Y felony;

(iv) Aggravated robbery, § 5-12-103;

(v) Terroristic act, § 5-13-310, involving an activity making it a Class Y felony;

(vi) Rape, § 5-14-103;

(vii) Sexual assault in the first degree, § 5-14-124;

(viii) Causing a catastrophe, § 5-38-202(a); or

(ix) Aggravated residential burglary, § 5-39-204; or

(B) A conviction of a comparable serious felony involving violence from another jurisdiction.

(3) A defendant who is convicted of rape, § 5-14-103, or sexual assault in the first degree, § 5-14-124, involving a victim less than fourteen (14) years of age and who has previously been convicted of one (1) or more of the serious felonies involving violence enumerated in subdivision (c)(2) of this section may be sentenced to pay any fine authorized by law for the rape or sexual assault in the first degree conviction and shall be sentenced to life in prison without the possibility of parole.

(4)(A) The following procedure governs a trial at which a sentence to an extended term of imprisonment is sought pursuant to this subsection:

(i) The jury shall first hear all evidence relevant to the serious felony involving violence with which the defendant is currently charged and shall retire to reach a verdict of guilt or innocence on this charge;

(ii)*(a)* If the defendant is found guilty of the serious felony involving violence, out of the hearing of the jury the trial court shall hear evidence of whether the defendant has pleaded guilty or nolo contendere to or been found guilty of a prior serious felony involving violence and shall determine the number of prior serious felony involving violence convictions, if any.

(b) The defendant has the right to hear and controvert evidence described in subdivision (c)(4)(A)(ii)(*a*) of this section and to offer evidence in his or her support;

(iii)*(a)* The trial court shall then instruct the jury as to the number of prior convictions for a serious felony involving violence and the statutory sentencing range.

(b) The jury may be advised as to the nature of a prior serious felony involving violence conviction and the date and place of a prior serious felony involving violence conviction; and

(iv) The jury shall retire again and then determine a sentence within the statutory range.

(B) The determination of whether a felony conviction from another jurisdiction is comparable to an enumerated serious felony involving violence under Arkansas criminal law lies within the discretion of the trial judge at the time of sentencing.

(d)(1) A defendant who is convicted of a felony involving violence enumerated in subdivision (d)(2) of this section and who previously has been convicted of two (2) or more of the felonies involving violence enumerated in subdivision (d)(2) of this section may be sentenced to pay any fine authorized by law for the felony involving violence conviction and shall be sentenced to an extended term of imprisonment without

eligibility for parole or community correction transfer except under § 16-93-615 as follows:

(A) For a conviction of a Class Y felony, a term of imprisonment of not less than life in prison;

(B) For a conviction of a Class A felony, a term of imprisonment of not less than forty (40) years nor more than life in prison;

(C) For a conviction of a Class B felony or for a conviction of an unclassified felony punishable by life imprisonment, a term of imprisonment of not less than thirty (30) years nor more than sixty (60) years;

(D) For a conviction of a Class C felony, a term of imprisonment of not less than twenty-five (25) years nor more than forty (40) years;

(E) For a conviction of a Class D felony, a term of imprisonment of not less than twenty (20) years nor more than forty (40) years; and

(F) For a conviction of an unclassified felony punishable by less than life imprisonment, a term of imprisonment not more than three (3) times the maximum sentence for the unclassified felony offense.

(2) As used in this subsection, "felony involving violence" means:

(A) Any of the following felonies:

(i) Murder in the first degree, § 5-10-102;

(ii) Murder in the second degree, § 5-10-103;

(iii) Kidnapping, § 5-11-102;

(iv) Aggravated robbery, § 5-12-103;

(v) Rape, § 5-14-103;

(vi) Battery in the first degree, § 5-13-201;

(vii) Terroristic act, § 5-13-310;

(viii) Sexual assault in the first degree, § 5-14-124;

(ix) Sexual assault in the second degree, § 5-14-125;

(x) Domestic battering in the first degree, § 5-26-303;

(xi) Aggravated residential burglary, § 5-39-204;

(xii) Unlawful discharge of a firearm from a vehicle, § 5-74-107;

(xiii) Criminal use of prohibited weapons, § 5-73-104, involving an activity making it a Class B felony; or

(xiv) A felony attempt, solicitation, or conspiracy to commit:

(a) Capital murder, § 5-10-101;

(b) Murder in the first degree, § 5-10-102;

(c) Murder in the second degree, § 5-10-103;

(d) Kidnapping, § 5-11-102;

(e) Aggravated robbery, § 5-12-103;

(f) Rape, § 5-14-103;

(g) Battery in the first degree, § 5-13-201;

(h) Domestic battering in the first degree, § 5-26-303; or

(i) Aggravated residential burglary, § 5-39-204; or

(B) A conviction of a comparable felony involving violence from another jurisdiction.

(3)(A) The following procedure governs a trials at which a sentence to an extended term of imprisonment is sought pursuant to this subsection:

(i) The jury shall first hear all evidence relevant to the felony involving violence with which the defendant is currently charged and shall retire to reach a verdict of guilt or innocence on this charge;

(ii)*(a)* If the defendant is found guilty of the felony involving violence, out of the hearing of the jury the trial court shall hear evidence of whether the defendant has pleaded guilty or nolo contendere to or been found guilty of two (2) or more prior felonies involving violence and shall determine the number of prior felony involving violence convictions, if any.

(b) The defendant has the right to hear and controvert evidence described in subdivision (d)(3)(A)(ii)(*a*) of this section and to offer evidence in his or her support;

(iii)*(a)* The trial court shall then instruct the jury as to the number of prior felony involving violence convictions and the statutory sentencing range.

(b) The jury may be advised as to the nature of a prior felony involving violence conviction and the date and place of a prior felony involving violence conviction; and

(iv) The jury shall retire again and then determine a sentence within the statutory range.

(B) The determination of whether a felony conviction from another jurisdiction is comparable to an enumerated felony involving violence under Arkansas criminal law lies within the discretion of the trial judge at the time of sentencing.

(e)(1) For the purpose of determining whether a defendant has previously been convicted or found guilty of two (2) or more felonies, a conviction or finding of guilt of burglary, § 5-39-201, and of the felony that was the object of the burglary are considered a single felony conviction or finding of guilt.

(2) A conviction or finding of guilt of an offense that was a felony under the law in effect prior to January 1, 1976, is considered a previous felony conviction or finding of guilt.

(f) For the purposes of determining whether a defendant has previously been convicted of a serious felony involving violence or a felony involving violence under subsections (c) and (d) of this section, the entry of a plea of guilty or nolo contendere or a finding of guilt by a court to a felony enumerated in subsections (c) and (d) of this section, respectively, as a result of which a court places the defendant on a suspended imposition of sentence, a suspended sentence, or probation, or sentences the defendant to the Department of Correction, is considered a previous felony conviction.

(g) Any defendant deemed eligible to be sentenced under a provision of both subsections (c) and (d) of this section shall be sentenced only under subsection (d) of this section.

(h) If the provisions of subsection (c) or (d) of this section, or both, are held invalid by a court, the defendant's case shall be remanded to the trial court for resentencing of the defendant under the provisions of subsections (a) and (b) of this section.

History. Acts 1975, No. 280, § 1001; 1977, No. 474, § 4; 1981, No. 620, § 9; 1983, No. 409, § 3; A.S.A. 1947, § 41-1001; Acts 1993, No. 532, § 7; 1993, No. 550, § 7; 1995, No. 1009, § 1; 1995, No. 1011, § 1; 1997, No. 1197, § 1; 2001, No. 1553, § 6; 2003, No. 1390, § 2; 2006 (1st Ex. Sess.), No. 5, § 1; 2007, No. 827, §§ 15, 16; No. 852, § 1; 2009, No. 1395, §§ 1, 2; 2011, No. 570, §§ 19, 20.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "Legislative intent. The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Amendments. The 2007 amendment by No. 827 deleted former (d)(2)(A)(viii) and (ix).

The 2007 amendment by No. 852 inserted "to pay any fine authorized by law for the felony conviction and" in (a)(1) and (b)(1); inserted "may be sentenced to pay any fine authorized by law for the serious felony involving violence conviction and" in (c)(1); inserted "may be sentenced to pay any fine authorized by law for the rape or sexual assault in the first degree conviction and" in (c)(3); inserted "may be sentenced to pay any fine authorized by law for the felony involving violence conviction and" in (d)(1); and made a stylistic change.

The 2009 amendment added (c)(2)(ix); inserted present (d)(2)(A)(xi) and redesignated the remaining subdivisions accordingly; added (d)(2)(A)(xiv)(*i*); and made related changes.

The 2011 amendment substituted "§ 16-93-615" for "§ 16-93-1302" in (c)(1)(B) and (d)(1).

CASE NOTES

Analysis

In General.
Construction.
Information.
Propriety of Sentence.
Retrial.
Sentences.

In General.

Purpose of the statute is to punish repeat offenders severely. Misenheimer v. State, 100 Ark. App. 189, 265 S.W.3d 764 (2007).

Construction.

Court must give the words of the statute their ordinary meaning. Misenheimer v. State, 100 Ark. App. 189, 265 S.W.3d 764 (2007).

Statute is unambiguous. Misenheimer v. State, 100 Ark. App. 189, 265 S.W.3d 764 (2007).

Information.

Even though a prosecutor was not allowed to amend a felony information under § 16-85-407 in a theft of property case to show the value of a vehicle stolen since that changed the class of the crime, there was no reversible error because the sentence imposed was less than the maximum for either the amended or the original charge. Therefore, defendant was not prejudiced. Ward v. State, 97 Ark. App. 294, 248 S.W.3d 489 (2007).

Propriety of Sentence.

Saline County court did not err in sentencing defendant as a habitual offender under subsection (b) of this section after defendant was convicted of felonies in Pulaski County where two days separated defendant's theft of a pick-up truck and defendant's crimes during a high-speed chase. Defendant's crimes involved multiple acts, harmed different people, and occurred at different locations in different counties. Misenheimer v. State, 100 Ark. App. 189, 265 S.W.3d 764 (2007).

Retrial.

Where defendant was convicted of delivery of methamphetamine, defendant pled guilty to eight other felony drug charges during the pendency of his appeal; after his first case was reversed and remanded, the state did not err by using the felony convictions to amend the information to allege that defendant was subject to punishment as a habitual offender under this section. During defendant's new trial, the circuit court did not err in instructing the jury of defendant's habitual-offender status; defendant was clearly eligible for an enhanced sentence. Phavixay v. State, 2009 Ark. 452, — S.W.3d — (2009).

Sentences.

Because defendant pled guilty to a Class C felony as a habitual offender, the circuit court was required to sentence her in accordance with § 5-4-301(a)(2) and subdivision (a)(2)(D) of this section, and the circuit court exceeded its statutory authority when it placed defendant on probation; defendant knew about the statute's sentencing range and, at the time of defendant's plea in open court, the circuit court expressly reiterated that her offense carried with it a sentencing range of three to twenty years' imprisonment. State v. Joslin, 364 Ark. 545, 222 S.W.3d 168 (2006).

In a case involving a habitual offender, a 15-year sentence imposed for felony weapon possession was illegal because the maximum sentence allowed under § 5-4-501(a)(2)(E) was 12 years. Ward v. State, 97 Ark. App. 294, 248 S.W.3d 489 (2007).

5-4-504. Habitual offenders — Proof of previous conviction.

CASE NOTES

Cited: Ray v. State, 2009 Ark. 521, — S.W.3d — (2009).

Subchapter 6 — Trial and Sentence — Capital Murder

5-4-602. Capital murder charge — Trial procedure.

RESEARCH REFERENCES

Ark. L. Rev. Article, Ethical and Effective Representation in Arkansas Capital Trials, 60 Ark. L. Rev. 1.

CASE NOTES

Analysis

Evidence.
Victim Impact Evidence.
—Constitutionality.
—In General.
—Relevance.

Evidence.

It was not clear whether the testimony of a psychologist regarding the state death-row inmate's social history would have been admissible pursuant to subdivision (4)(B) of this section at the penalty phase of the inmate's capital murder trial without other witnesses providing a factual foundation for his opinions; although, at the time of the inmate's trial, expert testimony presenting social history as mitigating evidence at the penalty phase of Arkansas capital cases was not uncommon, other witnesses, usually the inmate, also testified and provided factual foundation for the expert's opinions. While the federal district court allowed this evidence at the inmate's evidentiary hearing under 28 U.S.C.S. § 2254(e)(2), the state trial court in a Ark. R. Crim. P. 37 evidentiary proceeding was in the best position to consider this issue. Williams v. Norris, 576 F.3d 850 (8th Cir. 2009).

Victim Impact Evidence.

State inmate, who was convicted of murder and sentenced to death, was not entitled to federal habeas relief based on the admission of victim impact testimony under this section; application of the victim impact evidence statute, which was passed after the crime was committed, did

not violate the Ex Post Facto Clause because the statute was procedural in nature. Also, the Arkansas Supreme Court did not unreasonably apply federal law in finding no Sixth Amendment violation, as victim impact testimony was not an aggravating circumstance, and in finding no requirement that the jury be specifically instructed about how to consider the evidence. Johnson v. Norris, 537 F.3d 840 (8th Cir. 2008), cert. denied, — U.S. —, 129 S. Ct. 1334, 173 L. Ed. 2d 605 (2009).

In a capital murder case, the state was properly allowed to present three witnesses who discussed the impact of the victims' deaths because this section did not declare what victim-impact evidence was relevant in any given case — that issue was decided by the circuit court, and victim-impact evidence was relevant to assist the jury in imposing punishment based on a measurement of the injury to society. Thomas v. State, 370 Ark. 70, 257 S.W.3d 92 (2007), rehearing denied, — Ark. —, — S.W.3d —, 2007 Ark. LEXIS 397 (June 21, 2007), cert. denied, 552 U.S. 1025, 128 S. Ct. 620, 169 L. Ed. 2d 399 (2007).

—Constitutionality.

Where habeas petitioner argued that his trial counsel was ineffective for failing to challenge the Arkansas victim impact statute as unconstitutional, counsel was not ineffective because subdivision (4) of this section was not unconstitutional, and the petitioner failed to show how the victim impact testimony in his case prejudiced him or violated his constitutional rights. Jackson v. Norris, 468 F. Supp.2d 1030 (E.D. Ark. 2007), vacated, 2007 U.S. App. LEXIS 27006 (8th Cir. Ark. 2007).

—In General.

Subdivison (4) of this section is not in conflict with §§ 5-4-603 through 5-4-605 and the Arkansas Rules of Evidence because victim-impact evidence is relevant to punishment separately from aggravating and mitigating circumstances. Anderson v. State, 367 Ark. 536, 242 S.W.3d 229 (2006), cert. denied, Anderson v. Arkansas, 551 U.S. 1133, 127 S. Ct. 2973, 168 L. Ed. 2d 707 (2007).

—Relevance.

In defendant's trial for capital murder, the testimony of the victim's father, two sisters, and one of her children was not unduly prejudicial but rather was relevant to show the impact her death had on her family, which was precisely the purpose envisioned by the Arkansas General Assembly in enacting subdivision (4) of this section; thus, the trial court did not abuse its discretion in admitting victim-impact evidence during defendant's sentencing because such evidence was relevant under the Arkansas capital-murder-sentencing process. Springs v. State, 368 Ark. 256, 244 S.W.3d 683 (2006), cert. denied, 550 U.S. 939, 127 S. Ct. 2257, 167 L. Ed. 2d 1100 (2007).

Cited: Thessing v. State, 365 Ark. 384, 230 S.W.3d 526 (2006); Lacy v. State, 2010 Ark. 388, — S.W.3d — (2010).

5-4-603. Findings required for death sentence — Harmless error review.

(a) The jury shall impose a sentence of death if the jury unanimously returns written findings that:

(1) An aggravating circumstance exists beyond a reasonable doubt;

(2) Aggravating circumstances outweigh beyond a reasonable doubt all mitigating circumstances found to exist; and

(3) Aggravating circumstances justify a sentence of death beyond a reasonable doubt.

(b) The jury shall impose a sentence of life imprisonment without parole if the jury finds that:

(1) Aggravating circumstances do not exist beyond a reasonable doubt;

(2) Aggravating circumstances do not outweigh beyond a reasonable doubt all mitigating circumstances found to exist; or

(3) Aggravating circumstances do not justify a sentence of death beyond a reasonable doubt.

(c) If the jury does not make any finding required by subsection (a) of this section, the court shall impose a sentence of life imprisonment without parole.

(d)(1) On an appellate review of a death sentence, the Supreme Court shall conduct a harmless error review of the defendant's death sentence if:

(A) The Supreme Court finds that the jury erred in finding the existence of any aggravating circumstance for any reason; and

(B) The jury found no mitigating circumstance.

(2) The Supreme Court shall conduct a harmless error review under subdivision (d)(1) of this section by determining that a remaining aggravating circumstance:

(A) Exists beyond a reasonable doubt; and

(B) Justifies a sentence of death beyond a reasonable doubt.

(e) If the Supreme Court concludes that the erroneous finding of any aggravating circumstance by the jury would not have changed the jury's decision to impose the death penalty on the defendant, then a simple majority of the court may vote to affirm the defendant's death sentence.

History. Acts 1975, No. 280, § 1302; 1977, No. 474, § 11; A.S.A. 1947, § 41-1302; Acts 1987, No. 412, § 1.

Publisher's Notes. This section is being set out to reflect corrections in (a)(2) and (b)(2).

RESEARCH REFERENCES

Ark. L. Rev. Article, Ethical and Effective Representation in Arkansas Capital Trials, 60 Ark. L. Rev. 1.

CASE NOTES

Analysis

Constitutionality.
Aggravating or Mitigating Circumstances.
Construction With Other Law.
Jury Instructions.
Victim Impact Evidence.

Constitutionality.

This section is not facially unconstitutional on grounds that it does not permit the jury to give adequate effect to mitigating evidence. Williams v. Norris, 576 F.3d 850 (8th Cir. 2009).

Aggravating or Mitigating Circumstances.

Because a jury clearly erred in finding the aggravating circumstance of an underlying robbery when defendant was trying to recover from the murder victim money that he had lost gambling in a card game with the victim, harmless error analysis was not required. Daniels v. State, 373 Ark. 536, 285 S.W.3d 205 (2008), superseded by statute as stated in, Heard v. State, 2009 Ark. 546, — S.W.3d — (2009).

Construction With Other Law.

Section 5-4-602(4) is not in conflict with §§ 5-4-603 through 5-4-605 and the Arkansas Rules of Evidence because victim-impact evidence is relevant to punishment separately from aggravating and mitigating circumstances. Anderson v. State, 367 Ark. 536, 242 S.W.3d 229 (2006), cert. denied, Anderson v. Arkansas, 551 U.S. 1133, 127 S. Ct. 2973, 168 L. Ed. 2d 707 (2007).

Jury Instructions.

Judge's instruction during the sentencing phase in a capital murder case that the jury could not, consistent with the law and the evidence, find that no evidence of mitigating circumstances had been presented, did not violate a habeas petitioner's rights under the Sixth and Eighth Amendments because the judge promoted, rather than obstructed, the jury's consideration of mitigating evidence. Jackson v. Norris, 468 F. Supp.2d 1030 (E.D. Ark. 2007), vacated, 2007 U.S. App. LEXIS 27006 (8th Cir. Ark. 2007).

Where habeas petitioner argued that his trial counsel was ineffective for failing to object to the trial court's handling of the jury's error concerning the existence of mitigating circumstances, even assuming that the petitioner could show deficient performance in the failure to object, the failure to object had no effect on the jury's imposition of the death penalty because the trial court made no error in instructing the jury during the penalty phase. Jackson v. Norris, 468 F. Supp.2d 1030 (E.D. Ark. 2007), vacated, 2007 U.S. App. LEXIS 27006 (8th Cir. Ark. 2007).

Victim Impact Evidence.

Harmless error analysis under this section did not apply in reviewing the propriety of victim impact statements in which the victim's survivors testified that they wished the jury to impose the death sentence, because the alleged error in admitting the statements did not challenge the jury's finding of aggravating circumstances. Miller v. State, 2010 Ark. 1, — S.W.3d — (2010), rehearing denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 95 (Feb. 12, 2010).

Cited: Thessing v. State, 365 Ark. 384, 230 S.W.3d 526 (2006); Thomas v. State, 370 Ark. 70, 257 S.W.3d 92 (2007).

5-4-604. Aggravating circumstances.

RESEARCH REFERENCES

ALR. Validity, Construction, and Application of Aggravating and Mitigating Provisions of Death Penalty Statutes — Supreme Court Cases. 21 A.L.R. Fed. 2d 1.

Construction and Application of United States Sentencing Guideline § 2A2.1(b)(1), 18 U.S.C.A., Providing Enhancement for Attempted Murder or Assault with Intent to Commit Murder Dependent Upon Nature or Degree of Injury. 30 A.L.R. Fed. 2d 385.

Ark. L. Rev. Article, Ethical and Effective Representation in Arkansas Capital Trials, 60 Ark. L. Rev. 1.

CASE NOTES

Analysis

Accomplice Testimony.
Cruel or Depraved Manner.
Pecuniary Gain.
Prior Offenses.
Proof.
Victim Impact Evidence.

Accomplice Testimony.

Defendant's sentence of death after he was convicted of two counts of capital murder was appropriate under former § 41-1303(4) because a victim's mother testified that she found the victims' child in their home, near his father's lifeless body, and shotgun shells were found both in the living room, where the child was found, as well as in a bedroom in which was the child's crib. Prior to the murders occurring, defendant told an accomplice that children might be present and that those over eight would need to be eliminated as possible witnesses. Wertz v. State, 374 Ark. 256, 287 S.W.3d 528 (2008).

Cruel or Depraved Manner.

State inmate, who was convicted of murder and sentenced to death, was not entitled to federal habeas relief based on a claim that the "especially cruel manner" aggravating circumstance under subdivision (8) of this section was unconstitutionally vague or overbroad; the United States Supreme Court had upheld a nearly identical statute against an Eighth Amendment vagueness challenge, and it was not unreasonable for the Arkansas Supreme Court to have concluded that the aggra-

vating circumstance genuinely narrowed the class of death-eligible persons. Johnson v. Norris, 537 F.3d 840 (8th Cir. 2008), cert. denied, — U.S. —, 129 S. Ct. 1334, 173 L. Ed. 2d 605 (2009).

In the death-row inmate's case, the jury's unanimous finding as an aggravating circumstance that capital murder was committed in an especially cruel or depraved manner under subdivision (8)(A) of this section was supported by constitutionally sufficient evidence since the circumstantial evidence in the record allowed a rational jury to find the requisite intent to inflict mental anguish, serious physical abuse, or torture. Williams v. Norris, 576 F.3d 850 (8th Cir. 2009).

After defendant's conviction of capital murder, the jury that sentenced him to death properly found the existence of aggravating factors involving cruelty and depravity, as evidence that defendant broke into the victim's apartment, waited hours for her to return, and then viciously attacked her as she walked in the door, stabbing her several times, was sufficient to prove the murder was especially cruel or depraved. Marcyniuk v. State, 2010 Ark. 257, — S.W.3d — (2010), rehearing denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 402 (Aug. 6, 2010).

Pecuniary Gain.

In a capital murder case, there was sufficient evidence that defendant murdered the victim for pecuniary gain where defendant took the victim's car, television set, silverware, Bible, and other items of personal property from her home after he killed her. Thessing v. State, 365 Ark. 384, 230 S.W.3d 526 (2006), cert. denied, Thessing v. Arkansas, 549 U.S. 891, 127 S. Ct. 193, 166 L. Ed. 2d 158 (2006).

In the death-row inmate's capital murder trial, the pecuniary gain statutory aggravating factor did not unconstitutionally fail to narrow the class of death-eligible offenders on the ground that it merely duplicated an element of the underlying crime of felony murder during the course of a robbery, because the jury in the inmate's case was not instructed that the felony underlying the charge of capital murder was robbery; rather, the jury was instructed that the underlying felony was kidnapping, pursuant to § 5-10-101(a)(1)(iii), and that, consistent with the statutory definition of kidnapping under § 5-11-102(a)(3)-(5), it had to find that the inmate had restrained the victim with the purpose of inflicting physical injury upon her or engaging in sexual intercourse or sexual contact, or of committing aggravated robbery or any flight thereafter. After convicting the inmate of capital murder, the jury found in the penalty phase that he committed the murder for pecuniary gain, consistent with subdivision (6) of this section; thus, there was no duplication of constitutional dimension or otherwise. Williams v. Norris, 576 F.3d 850 (8th Cir. 2009).

Prior Offenses.

Consideration of a death-row inmate's prior conviction for a robbery that he committed when he was 15 years old as an aggravating factor under subdivision (3) of this section did not violate the Eighth Amendment because, in 1988, years before the inmate's capital murder trial, a plurality of the United States Supreme Court wrote that execution of a 15-year-old would violate the Eighth Amendment; thus, the argument that the inmate belatedly sought to raise before the federal habeas court was not so novel that its legal basis was not reasonably available to him in state court. Williams v. Norris, 576 F.3d 850 (8th Cir. 2009).

Proof.

In a capital murder case, there was sufficient evidence that the victim had a temporary or permanent physical disability where the victim was 67 years old, overweight, and had recently undergone chemotherapy and radiation treatments; in light of the fact that the victim was beaten to death without being able to flee or defend herself and the fact that he had been to her house before, substantial evidence existed to support the jury's verdict regarding the aggravating circumstance. Thessing v. State, 365 Ark. 384, 230 S.W.3d 526 (2006), cert. denied, Thessing v. Arkansas, 549 U.S. 891, 127 S. Ct. 193, 166 L. Ed. 2d 158 (2006).

Victim Impact Evidence.

Section 5-4-602(4) is not in conflict with §§ 5-4-603 through 5-4-605 and the Arkansas Rules of Evidence because victim-impact evidence is relevant to punishment separately from aggravating and mitigating circumstances. Anderson v. State, 367 Ark. 536, 242 S.W.3d 229 (2006), cert.

denied, Anderson v. Arkansas, 551 U.S. 1133, 127 S. Ct. 2973, 168 L. Ed. 2d 707 (2007).

Cited: Thomas v. State, 370 Ark. 70, 257 S.W.3d 92 (2007).

5-4-605. Mitigating circumstances.

RESEARCH REFERENCES

ALR. Validity, Construction, and Application of Aggravating and Mitigating Provisions of Death Penalty Statutes — Supreme Court Cases. 21 A.L.R. Fed. 2d 1.

Construction and Application of United States Sentencing Guideline § 2A2.1(b)(1), 18 U.S.C.A., Providing Enhancement for Attempted Murder or Assault with Intent to Commit Murder Dependent Upon Nature or Degree of Injury. 30 A.L.R. Fed. 2d 385.

CASE NOTES

Analysis

Instructions.
State of Mind.
Victim Impact Evidence.

Instructions.

Where habeas petitioner argued that his trial counsel was ineffective for failing to object to a misstatement of law by the prosecution regarding mitigating circumstances in closing arguments during the sentencing phase of the petitioner's capital murder trial, even assuming that the petitioner could show deficient performance in the failure to object, the failure to object did not result in prejudice to the petitioner because (1) the prosecution introduced its argument by reciting the exact language of subdivision (3) of this section, (2) Form 2 of the verdict form, which the trial court read aloud to the jury, also contained the exact language provided under subdivision (3), and (3) the trial court instructed the jury that it was not limited to the mitigating circumstances set forth in Form 2 and had discretion to find from the evidence that other mitigating circumstances probably existed. Jackson v. Norris, 468 F. Supp.2d 1030 (E.D. Ark. 2007), vacated, 2007 U.S. App. LEXIS 27006 (8th Cir. Ark. 2007).

State of Mind.

Where defendant was sentenced to death after his conviction of capital murder, as the jury acknowledged that he suffered from borderline-personality disorder and generalized anxiety disorder but found that those disorders did not prevent from being able to conform his behavior to the law and that he was not under extreme mental or emotional disturbance at the time of the murder, the trial court met its obligation to bring before the jury mitigating factors regarding defendant's mental disease or defect. Marcyniuk v. State, 2010 Ark. 257, — S.W.3d — (2010), rehearing denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 402 (Aug. 6, 2010).

Victim Impact Evidence.

Section 5-4-602(4) is not in conflict with §§ 5-4-603 through 5-4-605 and the Arkansas Rules of Evidence because victim-impact evidence is relevant to punishment separately from aggravating and mitigating circumstances. Anderson v. State, 367 Ark. 536, 242 S.W.3d 229 (2006), cert. denied, Anderson v. Arkansas, 551 U.S. 1133, 127 S. Ct. 2973, 168 L. Ed. 2d 707 (2007).

Cited: Thomas v. State, 370 Ark. 70, 257 S.W.3d 92 (2007).

5-4-616. Procedures following remand of capital case after vacation of death sentence — Retroactive application.

CASE NOTES

Applicability.

It was error for three murder victims' survivors to testify during the sentencing phase that they desired the jury to impose the death sentence; the testimony resulted in a violation of defendant's Eighth Amendment rights. The case was remanded to the trial court for resentencing pursuant to this section. Miller v. State, 2010 Ark. 1, — S.W.3d — (2010), rehearing denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 95 (Feb. 12, 2010).

5-4-617. Method of execution.

(a)(1) The sentence of death is to be carried out by intravenous lethal injection of one (1) or more chemicals, as determined in kind and amount in the discretion of the Director of the Department of Correction.

(2) The chemical or chemicals injected may include one (1) or more of the following substances:

(A) One (1) or more ultra-short-acting barbiturates;

(B) One (1) or more chemical paralytic agents;

(C) Potassium chloride; or

(D) Any other chemical or chemicals, including but not limited to saline solution.

(3) The condemned convict's death will be pronounced according to accepted standards of medical practice.

(4) The director shall determine in his or her discretion any and all policies and procedures to be applied in connection with carrying out the sentence of death, including but not limited to:

(A) Matters concerning logistics and personal correspondence concerning witnesses;

(B) Security;

(C) Injection preparations;

(D) Injection implementation; or

(E) Arrangements for disposition of the executed convict's body and personal property.

(5)(A) The policies and procedures for carrying out the sentence of death and any and all matters related to the policies and procedures for the sentence of death including but not limited to the director's determinations under this subsection are not subject to the Arkansas Administrative Procedure Act, § 25-15-201 et seq.

(B) The policies and procedures for carrying out the sentence of death and any and all matters related to the policies and procedures for the sentence of death are not subject to the Freedom of Information Act of 1967, § 25-19-101 et seq., except for the choice of chemical or chemicals that may be injected, including the quantity, method, and order of the administration of the chemical or chemicals.

(b)(1) If this section is held unconstitutional by an appellate court of competent jurisdiction, the sentence of death shall be carried out by

electrocution in a manner determined by the director in his or her discretion.

(2) However, if the holding of the appellate court described in subdivision (b)(1) of this section is subsequently vacated, overturned, overruled, or reversed, the sentence of death shall be carried out by lethal injection as described in this section.

History. Acts 1983, No. 774, §§ 1, 5, 6; A.S.A. 1947, §§ 41-1352, 41-1356, 41-1357; Acts 2009, No. 1296, § 2.

A.C.R.C. Notes. Acts 2009, No. 1296, § 1 provided: "This act shall be known and may be cited as the 'Methods of Execution Act'."

Amendments. The 2009 amendment rewrote the section.

CASE NOTES

Analysis

Constitutionality.
Public Access.

Constitutionality.

In a 42 U.S.C.S. § 1983 case alleging that this section, the Arkansas Methods of Execution Act, violated that Due Process Clause of the Fourteenth Amendment and the Ex Post Facto Claus, two death-row inmates argued that the Arkansas Department of Corrections violated the Food, Drug and Cosmetic Act (FDCA), 21 U.S.C.S. § 301 et seq., and the Controlled Substances Act (CSA), 21 U.S.C.S. § 801 et seq. Neither the FDCA nor the CSA provided for a private right of action, and the Declaratory Judgment Act did not provide them with private rights of action under the FDCA and the CSA. Jones v. Hobbs, 745 F. Supp. 2d 886 (E.D. Ark. 2010).

2009 Ark. Acts 1296, amending this section, applied to all who would be executed after its enactment, and it did not change either the inmate's criminal liability or his sentence; because the Act would not be retroactively applied, it did not violate the ex post facto clause, and the trial court had to lift the injunction staying the inmate's execution. Ark. Dep't of Corr. v. Williams, 2009 Ark. 523, — S.W.3d — (2009), rehearing denied, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 823 (Dec. 10, 2009), cert. denied, Williams v. Hobbs, — U.S. —, 131 S. Ct. 271, 178 L. Ed. 2d 179 (2010).

Public Access.

Mere fact that § 16-90-502(d)(2) requires that between six to twelve respectable citizens be present at an execution to verify that the execution was conducted in compliance with subdivision (a)(1) of this section does not transform executions, which § 16-90-502(d)(1) states are private, into a public proceeding comparable to a criminal trial. Because Arkansas does not have an enduring tradition of public executions, the mere fact that full public access to executions could play a significant role in the proper functioning of capital punishment and could better inform the public debate about execution by lethal injection is not a sufficient basis for reading a right of public access to executions into U.S. Const., Amend. I. Arkansas Times, Inc. v. Norris, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 3500 (E.D. Ark. Jan. 7, 2008).

42 U.S.C.S. § 1983 suit challenging the Arkansas Department of Correction's (ADC) lethal injection procedures was dismissed under Fed. R. Civ. P. 12(b)(6): (1) in the suit, a newspaper publisher, a newspaper editor, and a journalists' society challenged the ADC's legal injection procedures, claiming that the procedures violated their U.S. Const., Amend. I rights because those procedures did not open up the entire execution process to public view; (2) § 16-90-502(d)(1) made clear that executions were private, and not public, proceedings; (3) the U.S. Supreme Court had not recognized a First Amendment right of access to executions and had held that neither the public nor the media had a U.S. Const., Amends. I, XIV, right to access private areas of prisons; and (4) the fact that subdivision (a)(1) of this section required the presence of witnesses to verify that executions were conducted in

compliance with subdivision (a)(1) of this section did not transform executions into public proceedings or render them comparable to criminal trials, in which full public access was constitutionally required. Arkansas Times, Inc. v. Norris, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 3500 (E.D. Ark. Jan. 7, 2008).

Cited: Thessing v. State, 365 Ark. 384, 230 S.W.3d 526 (2006).

5-4-618. Mental retardation.

RESEARCH REFERENCES

Ark. L. Rev. Article, Ethical and Effective Representation in Arkansas Capital Trials, 60 Ark. L. Rev. 1.

CASE NOTES

Analysis

Applicability.
Determinative Factors.
Rebuttable Presumption.

Applicability.

Whether defendant was mentally retarded was a question of fact for the jury to decide in the sentencing phase of his trial where the trial court found the evidence to be inconsistent, based on the records and two mental evaluations, including evidence suggesting that defendant was malingering. Weston v. State, 366 Ark. 265, 234 S.W.3d 848 (2006).

State inmate was entitled to an evidentiary hearing on a federal habeas claim that the inmate's Arkansas death sentence violated the Eighth Amendment because of the inmate's mental retardation. The inmate's failure to present a mental retardation defense at trial pursuant to this section did not preclude the separate and previously unavailable federal claim. Simpson v. Norris, 490 F.3d 1029 (8th Cir. 2007), rehearing denied, 499 F.3d 874 (8th Cir. 2007), cert. denied, 552 U.S. 1224, 128 S. Ct. 1226, 170 L. Ed. 2d 140 (2008).

Where habeas petitioner, sentenced to death for murder, argued for the first time in his petition that he was mentally retarded and thus ineligible for the death penalty, and asserted that his failure to previously raise the issue was excused because such a claim was not available until a post-conviction decision by the U.S. Supreme Court barred the death penalty for the mentally retarded, the claim was rejected because the petitioner could have invoked the procedure available under this section. Jackson v. Norris, 468 F. Supp.2d 1030 (E.D. Ark. 2007), vacated, 2007 U.S. App. LEXIS 27006 (8th Cir. Ark. 2007).

Determinative Factors.

Term "adaptive behavior" under subdivision (a)(1)(B) of this section encompasses the same skill areas as adaptive functioning, but there is no age requirement on the evidence used to establish limitations in adaptive behavior. Jackson v. Norris, 615 F.3d 959 (8th Cir. 2010).

Prisoner was entitled to a hearing on a claim that carrying out the death penalty would violate the Eighth Amendment because the prisoner was mentally retarded. Fact issues existed as to whether the prisoner was mentally retarded under the definition set forth in subsection (a) of this section; tests administered prior to the prisoner's 18th birthday allegedly indicated an IQ of 70, and the prisoner offered evidence of a deficit in adaptive functioning prior to age 18 and a deficit in adaptive behavior with no age limit. Jackson v. Norris, 615 F.3d 959 (8th Cir. 2010).

Evidence supported trial court's finding that defendant was not mentally retarded, despite the fact that he had been in special education classes since elementary school, because experts testified that he had an intelligence quotient within the range of 71 to 84, low average, that he had been employed, and that while incarcerated he kept up with financial transactions, wrote letters, and held telephone conversations. Miller v. State, 2010 Ark. 1, — S.W.3d — (2010), rehearing denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 95 (Feb. 12, 2010).

Rebuttable Presumption.

Appellate court rejected inmate's motion to recall the mandate in his appeal and reopen his case as inmate never raised a claim of mental retardation until his federal habeas corpus petition, which was filed 10 years after his petition for post-conviction relief, and did not meet the presumption of retardation in subdivision (2) of this section as the inmate had an IQ of 94, which was far above the IQ of 65 that entitled a person to a presumption. Coulter v. State, 365 Ark. 262, 227 S.W.3d 904 (2006), cert. denied, Coulter v. Arkansas, 549 U.S. 858, 127 S. Ct. 138, 166 L. Ed. 2d 101 (2006).

Subchapter 7 — Enhanced Penalties for Certain Offenses

SECTION.

5-4-701. Definitions.

As used in this subchapter:

(1) "Child" means a person under sixteen (16) years of age; and

(2) "In the presence of a child" means in the physical presence of a child or knowing or having reason to know that a child is present and may see or hear an act.

History. Acts 2001, No. 1707, § 1; 2005, No. 1994, § 290; 2009, No. 33, § 1; 2011, No. 1120, § 5.

Amendments. The 2009 amendment inserted "aggravated cruelty to a dog, cat, or horse" in (2) and made a related change.

The 2011 amendment deleted "of assault, battery, domestic battering, aggravated cruelty to a dog, cat, or horse, or assault on a family member or household member" following "may see or hear an act" in (2).

5-4-702. Enhanced penalties for offenses committed in presence of a child.

(a) Any person who commits a felony offense involving homicide, § 5-10-101 — § 5-10-103, assault or battery, § 5-13-201 et seq., or domestic battering or assault on a family member or household member, § 5-26-303 — 5-26-309, may be subject to an enhanced sentence of an additional term of imprisonment of not less than one (1) year and not greater than ten (10) years if the offense is committed in the presence of a child.

(b) Any person who commits the offense of aggravated cruelty to a dog, cat, or horse under § 5-62-104 may be subject to an enhanced sentence of an additional term of imprisonment not to exceed five (5) years if the offense is committed in the presence of a child.

(c)(1) To seek an enhanced penalty established in this section, a prosecuting attorney shall notify the defendant in writing that the defendant is subject to the enhanced penalty.

(2) If the defendant is charged by information or indictment, the prosecuting attorney may include the written notice in the information or indictment.

(d) The enhanced portion of the sentence is consecutive to any other sentence imposed.

(e) Any person convicted under this section is not eligible for early release on parole or community correction transfer for the enhanced portion of the sentence.

History. Acts 2001, No. 1707, § 2; 2007, No. 1047, § 1; 2009, No. 33, § 1; 2009, No. 936, § 1.

Amendments. The 2007 amendment inserted "or community correction transfer" in (d).

The 2009 amendment by No. 33, in (a), updated an internal reference and made a minor stylistic change; inserted (b); and redesignated the remaining subsections accordingly.

The 2009 amendment by No. 936, in (a), inserted "homicide, § 5-10-101 — § 5-10-103," inserted "§ 5-13-201 et seq., or," substituted "§ 5-26-303 — 5-26-309" for "as provided in § 5-13-201 et seq., or § 5-26-303 — 5-26-311," and made related changes.

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Annual Survey of Case Law: Criminal Law, 29 U. Ark. Little Rock L. Rev. 849.

CASE NOTES

Construction.

Use of the word "may" does not mean that a jury has the discretion as to whether to impose an enhanced sentence where a crime of domestic violence was committed in the presence of a child, rather, it means the state had the option of seeking the enhancement; thus, where no sentence was imposed by the jury, a trial court did not err by imposing one under § 16-90-107(a). Sullivan v. State, 366 Ark. 183, 234 S.W.3d 285 (2006).

Subchapter 8 — Sentencing Alternative — Community Service Work

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A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "Legislative intent. The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

5-4-801. Definitions.

As used in this subchapter:

(1) "Community work project" means any program in which an eligible offender in a county jail is allowed to work under the supervision of a government entity on projects on public lands, public buildings, public roads, public parks, and public rights-of-way designed to benefit the government entity supervising the eligible offender;

(2) "Eligible offender" means any person convicted of a misdemeanor offense or felony offense other than:

(A) Capital murder, § 5-10-101;

(B) Murder in the first degree, § 5-10-102;

(C) Murder in the second degree, § 5-10-103;

(D) Manslaughter, § 5-10-104;

(E) Rape, § 5-14-103;

(F) Kidnapping, § 5-11-102;

(G) Aggravated robbery, § 5-12-103;

(H) Driving while intoxicated, second or subsequent offense, § 5-65-103;

(I) Negligent homicide, § 5-10-105;

(J) Trafficking a controlled substance, § 5-64-440;

(K) Any felony involving violence as listed under § 5-4-501(d)(2); or

(L) Any offense requiring registration under the Sex Offender Registration Act of 1997, § 12-12-901, et seq.; and

(3) "Work incentive credit" means a sentence credit of up to three (3) days as designated by the court toward completion of an eligible offender's sentence for each day the eligible offender works on a community work project.

History. Acts 2011, No. 570, § 21.

5-4-802. Rules.

The Board of Corrections shall promulgate necessary rules to be followed by a government entity in the supervision of eligible offenders utilized under this subchapter.

History. Acts 2011, No. 570, § 21.

5-4-803. Procedure.

(a) A court may sentence an eligible offender under this subchapter.

(b)(1) If a court elects to sentence an eligible offender under this subchapter, the court may suspend imposition of sentence for the eligible offender for a period not to exceed the period of years that is the maximum penalty for the offense for which convicted upon condition that the eligible offender be incarcerated in a county jail or regional jail to participate in a community work project.

(2) In order for the eligible offender to participate in a community work project, space must be available in the county jail or regional jail as certified by the county sheriff, to the Department of Correction for an eligible offender committed to the department, or to the court for an eligible offender serving time for a misdemeanor offense.

(3) The length of the community work project service and incarceration shall not exceed eighteen (18) months for a felony offense with work incentive credit or, in the case of a misdemeanor offense, the maximum

length of incarceration for the misdemeanor offense reduced by the work incentive credit.

(c)(1) If an eligible offender sentenced under this subchapter withdraws consent to participate in a community work project, then:

(A) The county sheriff shall notify the court and bring the eligible offender before the court within a reasonable time; and

(B) The court shall determine whether the eligible offender has withdrawn consent to participate in a community work project.

(2) If the court finds that the eligible offender has withdrawn consent to participate in the community work project, the court shall remand the eligible offender for the remaining portion of the eligible offender's sentence to the:

(A) Department of Correction for a felony offense; or

(B) County sheriff for a misdemeanor offense.

(3) If an eligible offender withdraws consent to participate in a community work project, the eligible offender is entitled to all good time and parole eligibility considerations as provided by law.

(4) Any portion of the sentence that was suspended by the court at the time of the original sentence is not affected by the removal of an eligible offender from participating in the community work project.

(d)(1) If an eligible offender's conduct while participating in a community work project is unsatisfactory, upon petition filed by the prosecuting attorney, the court may schedule a hearing to determine if the eligible offender should be allowed to continue to participate in the community work project.

(2) A hearing under this subsection shall follow the same format and accord the eligible offender the same safeguards as the revocation procedure in § 16-93-307.

(3) The burden of proof necessary for revocation of a sentence under this subchapter shall be a preponderance of the evidence that the eligible offender's conduct has been unsatisfactory while participating in a community work project.

(4) If the court finds that the eligible offender's conduct has been unsatisfactory while performing in a community work project, the court shall remand the eligible offender for the remaining portion of the eligible offender's sentence to the:

(A) Department of Correction for a felony offense; or

(B) County sheriff for a misdemeanor offense.

(5) If an eligible offender's conduct is found to be unsatisfactory, the eligible offender is entitled to all good time and parole eligibility considerations as provided by law.

History. Acts 2011, No. 570, § 21.

5-4-804. Medical treatment and costs.

The state is responsible for the cost of medical treatment approved by the Department of Correction of an eligible offender sentenced to a felony under this subchapter if the medical treatment is for:

(1) The result of an injury sustained on the work site of the community work project or during transportation to and from the work site by a government entity; or

(2)(A) The result of illness or an injury sustained by an eligible offender committed to the county jail or regional jail and who is assigned to a community work project.

(B) The Department of Correction may transfer an eligible offender committed to a county jail or regional jail under this subchapter to a medical facility or treatment facility, including a facility of the Department of Correction, it deems appropriate for the medical treatment.

(3) Nothing in this section precludes the Department of Correction from seeking reimbursement or damages from a person or entity that contributes to or causes the injury or illness referred to in this section.

History. Acts 2011, No. 570, § 21.

5-4-805. Reimbursement for housing eligible offenders.

The state shall reimburse a county for housing an eligible offender convicted of a felony offense and sentenced under this subchapter at a rate to be determined by the Board of Corrections.

History. Acts 2011, No. 570, § 21.

CHAPTER 5

DISPOSITION OF CONTRABAND AND SEIZED PROPERTY

SUBCHAPTER.

Subchapter 1 — General Provisions

SECTION.

5-5-101. Disposition of contraband and seized property.

(a) Any seized property shall be returned to the rightful owner or possessor of the seized property except contraband owned by a defendant.

(b)(1) As used in this section, "contraband" means any:

(A) Article possessed under a circumstance prohibited by law;

(B) Weapon or other instrument used in the commission or attempted commission of a felony;

(C) Visual, print, or electronic medium that depicts sexually explicit conduct involving a child prohibited under § 5-27-304;

(D) Visual, print, or electronic medium that contains a sexual performance of a child prohibited under § 5-27-403;

(E) Item the possession of which is prohibited by § 5-27-602;

(F) Item the production of which is prohibited by § 5-27-603;

(G) Item the production of which is prohibited by § 5-27-605; or

(H) Other article designated "contraband" by law.

(2) "Contraband" does not include a visual, a print, or an electronic medium created, obtained, or possessed by licensed medical personnel or a regulated medical facility for the purpose of treatment or documentation of injuries to a child.

(c)(1) Contraband shall be destroyed.

(2) Except as limited under subdivision (c)(3) of this section, in the discretion of the court having jurisdiction, any contraband capable of lawful use may be:

(A) Retained for use by the law enforcement agency responsible for the arrest; or

(B) Sold and the proceeds disposed of in the manner provided by subsections (e)-(g) of this section.

(3) Contraband described in subdivisions (b)(1)(C)-(H) of this section and having no lawful use shall not be retained.

(d)(1)(A) Except as provided in subdivision (d)(2) of this section, unclaimed seized property shall be sold at public auction to be held by the chief law enforcement officer of the county, city, or town law enforcement agency that seized the unclaimed seized property or the chief law enforcement officer's designee.

(B) The proceeds of the sale, less the cost of the sale and any storage charge incurred in preserving the unclaimed seized property, shall be paid into the general fund of the county, city, or town whose law enforcement agency performed the seizure.

(2)(A) Unclaimed seized property that is a recreational item may be donated at no cost to a local or state agency, a nonprofit organization, or an educational program designed to provide education, assistance, or recreation to children.

(B)(i) As used in subdivision (d)(2)(A) of this section, "recreational item" means an item generally used for children's activities and play.

(ii) "Recreational item" includes without limitation a bicycle but does not include a motor vehicle or motorcycle.

(e) The time and place of sale of seized property shall be advertised:

(1) For at least fourteen (14) days next before the day of sale by posting written notice at the courthouse door; and

(2) By publication in the form of at least two (2) insertions, at least three (3) days apart, before the day of sale in a weekly or daily newspaper published or customarily distributed in the county.

(f)(1) Any seized property to be sold at public sale shall be offered for sale on the day for which it was advertised between 9:00 a.m. and 3:00 p.m., publicly, by auction, and for ready money.

(2) The highest bidder shall be the purchaser.

(g)(1) The proceeds from any sale of seized property shall be delivered to the county, city, or town treasurer, as the case may be, to be held by him or her in a separate account for a period of three (3) months.

(2) If any person during the time described in subdivision (g)(1) of this section establishes to the satisfaction of the county, city, or town treasurer that he or she was at the time of sale the owner of any seized property sold as provided in subsection (f) of this section, the person shall be paid the amount realized from sale of the seized property less the expenses of the sale.

(3) Any money in the separate account not claimed or paid within the designated three-month period shall be paid into the general fund of the county, city, or town whose law enforcement agency performed the seizure.

History. Acts 1975, No. 280, § 1401; 1977, No. 360, § 4; A.S.A. 1947, § 41-1401; Acts 1991, No. 1030, § 1; 2003, No. 135, § 1; 2007, No. 703, §§ 1, 2; 2009, No. 748, § 5; 2011, No. 171, § 1.

Amendments. The 2007 amendment added (b)(3) through (b)(7) and made a related change; redesignated former (b)(3) as present (b)(8); added "but shall not . . . to a child" in (b)(8); substituted "Except as limited under subdivision (c)(3) of this section" for "However" in (c)(2); and added (c)(3).

The 2009 amendment redesignated (b)(1) through (b)(8) as (b)(1)(A) through (b)(1)(H), redesignated the exception in (b)(1)(H) as present (b)(2), and made related and minor stylistic changes.

The 2011 amendment redesignated (d)(1) as (d)(1)(A) and (d)(2) as (d)(1)(B); inserted "Except as provided in subdivision (d)(2) of this section" in (d)(1)(A); and added present (d)(2).

Subchapter 2 — Forfeiture of Conveyances Used in Commission of Certain Crimes

SECTION.

5-5-204. Use or sale of conveyances — Disposition of sale proceeds.

(a)(1) Upon conviction, when the circuit court having jurisdiction over the conveyance seized finds upon a hearing by a preponderance of the evidence that a ground for a forfeiture exists under this subchapter, the circuit court may enter an order to sell the conveyance with the proceeds, after allowance for reasonable expenses of seizure and maintenance of custody, going to satisfy any outstanding restitution under § 5-4-205 owed to a victim of an offense for which the conveyance was used, if the victim files a petition with the circuit court or makes a request to the circuit court within thirty (30) days of the filing of the judgment and commitment order of the convicted defendant.

(2) If there is not a victim of an offense owed restitution under § 5-4-205, the circuit court shall enter an order to:

(A) Permit the law enforcement agency or the prosecuting attorney for the judicial district in which the conveyance was seized to retain the conveyance for official use; or

(B)(i) Permit the law enforcement agency to sell the conveyance at a public or private sale.

(ii) In the event of a sale, the circuit court shall provide by order that the proceeds be used for payment of any proper expense of the proceeding for forfeiture and sale, including expenses of:

(a) Investigation;

(b) Seizure;

(c) Maintenance of custody;

(d) Advertising; and

(e) Court costs.

(b) Any proceeds from the sale of a forfeited conveyance under subdivision (a)(2)(B) of this section, or if there was a victim of an offense owed restitution under § 5-4-205, the proceeds remaining after the satisfaction of the victim's restitution under § 5-4-205 in excess of a proper expense shall be distributed as follows:

(1) Forty percent (40%) to be deposited into the State Treasury as special revenues to the credit of the Department of Arkansas State Police Fund;

(2)(A) Forty percent (40%) to the law enforcement agency that perfected the arrest.

(B) However, if a federal agency perfected the arrest, the forty percent (40%) under subdivision (b)(2)(A) of this section shall be distributed to the county sheriff's office of the county responsible for the prosecution; and

(3) Twenty percent (20%) to the county sheriff's office of the county responsible for the prosecution.

History. Acts 1985, No. 238, § 4; A.S.A. 1947, § 41-1406; Acts 2011, No. 866, § 1.

A.C.R.C. Notes. Acts 2011, No. 866, § 1, as enacted, amended subdivision (a)(1) of this section to read "Upon conviction, ... the circuit court shall ~~shall~~ may enter an order ...". The intent was to delete "shall" and insert "may".

Amendments. The 2011 amendment rewrote present (a)(1); inserted the introductory language of present (a)(2) and redesignated the subdivisions accordingly; and rewrote the introductory language of (b).

Subchapter 4 — Forfeiture of Weapons and Ammunition

SECTION.

5-5-401. Definitions.

As used in this subchapter, "weapon" means any firearm, bomb, explosive, metal knuckles, sword, spear, or other device employed as an instrument of crime by subjecting another to physical harm or fear of physical harm.

History. Acts 1995, No. 202, § 1; 2007, No. 827, § 17.

Amendments. The 2007 amendment deleted former (1) and made related changes.

5-5-402. Transfer to State Crime Laboratory.

(a)(1) Notwithstanding any other provision of this chapter, a weapon or ammunition seized by any agency of the State of Arkansas or any local law enforcement agency in the state, and that is forfeited pursuant to law, may be transferred to the State Crime Laboratory.

(2) However, no transfer of a weapon or ammunition shall be made pursuant to this section until there is a final determination concerning the disposition of the weapon or ammunition by the court having jurisdiction over the weapon or ammunition.

(b) In addition to a forfeited weapon or ammunition, any other weapon or ammunition held by an agency of the state or a local law enforcement agency for which the agency has no use may be transferred to the laboratory under the procedures prescribed in this subchapter.

(c) Nothing contained in this subchapter shall be construed to preclude a voluntary transfer to the State Crime Laboratory by an individual, entity, or agency of the United States Government.

History. Acts 1995, No. 202, § 1; 2007, No. 827, § 18.

Amendments. The 2007 amendment inserted "or ammunition" in (a)(2).

SUBTITLE 2. OFFENSES AGAINST THE PERSON

CHAPTER 10

HOMICIDE

5-10-101. Capital murder.

(a) A person commits capital murder if:

(1) Acting alone or with one (1) or more other persons:

(A) The person commits or attempts to commit:

(i) Terrorism, as defined in § 5-54-205;

(ii) Rape, § 5-14-103;

(iii) Kidnapping, § 5-11-102;

(iv) Vehicular piracy, § 5-11-105;

(v) Robbery, § 5-12-102;

(vi) Aggravated robbery, § 5-12-103;

(vii) Residential burglary, § 5-39-201(a);

(viii) Commercial burglary, § 5-39-201(b);

(ix) Aggravated residential burglary, § 5-39-204;

(x) A felony violation of the Uniform Controlled Substances Act, §§ 5-64-101 — 5-64-508, involving an actual delivery of a controlled substance; or

(xi) First degree escape, § 5-54-110; and

(B) In the course of and in furtherance of the felony or in immediate flight from the felony, the person or an accomplice causes the death of a person under circumstances manifesting extreme indifference to the value of human life;

(2) Acting alone or with one (1) or more other persons:

(A) The person commits or attempts to commit arson, § 5-38-301; and

(B) In the course of and in furtherance of the felony or in immediate flight from the felony, the person or an accomplice causes the death of any person;

(3) With the premeditated and deliberated purpose of causing the death of any law enforcement officer, jailer, prison official, firefighter, judge or other court official, probation officer, parole officer, any military personnel, or teacher or school employee, when such person is acting in the line of duty, the person causes the death of any person;

(4) With the premeditated and deliberated purpose of causing the death of another person, the person causes the death of any person;

(5) With the premeditated and deliberated purpose of causing the death of the holder of any public office filled by election or appointment or a candidate for public office, the person causes the death of any person;

(6) While incarcerated in the Department of Correction or the Department of Community Correction, the person purposely causes the death of another person after premeditation and deliberation;

(7) Pursuant to an agreement that the person cause the death of another person in return for anything of value, he or she causes the death of any person;

(8) The person enters into an agreement in which a person is to cause the death of another person in return for anything of value, and a person hired pursuant to the agreement causes the death of any person;

(9)(A) Under circumstances manifesting extreme indifference to the value of human life, the person knowingly causes the death of a person fourteen (14) years of age or younger at the time the murder was committed if the defendant was eighteen (18) years of age or older at the time the murder was committed.

(B) It is an affirmative defense to any prosecution under this subdivision (a)(9) arising from the failure of the parent, guardian, or person standing in loco parentis to provide specified medical or surgical treatment, that the parent, guardian, or person standing in loco parentis relied solely on spiritual treatment through prayer in accordance with the tenets and practices of an established church or religious denomination of which he or she is a member; or

(10) The person:

(A) Purposely discharges a firearm from a vehicle at a person or at a vehicle, conveyance, or a residential or commercial occupiable

structure that he or she knows or has good reason to believe to be occupied by a person; and

(B) Thereby causes the death of another person under circumstances manifesting extreme indifference to the value of human life.

(b) It is an affirmative defense to any prosecution under subdivision (a)(1) of this section for an offense in which the defendant was not the only participant that the defendant did not commit the homicidal act or in any way solicit, command, induce, procure, counsel, or aid in the homicidal act's commission.

(c)(1) Capital murder is punishable by death or life imprisonment without parole under §§ 5-4-601 — 5-4-605, 5-4-607, and 5-4-608.

(2) For any purpose other than disposition under §§ 5-4-101 — 5-4-104, 5-4-201 — 5-4-204, 5-4-301 — 5-4-307, 5-4-401 — 5-4-404, 5-4-501 — 5-4-504, 5-4-601 — 5-4-605, 5-4-607, 5-4-608, 16-93-307, 16-93-313, and 16-93-314, capital murder is a Class Y felony.

History. Acts 1975, No. 280, § 1501; 1983, No. 341, § 1; 1985, No. 840, § 1; A.S.A. 1947, § 41-1501; Acts 1987, No. 242, § 2; 1989, No. 97, § 1; 1989, No. 856, § 1; 1991, No. 683, § 1; 1993, No. 1189, § 2; 1995, No. 258, § 1; 1995, No. 800, § 1; 2003, No. 1342, § 5; 2007, No. 827, §§ 19, 20; 2009, No. 748, § 6; 2009, No. 1395, § 3; 2011, No. 570, § 22.

A.C.R.C. Notes. Acts 2009, No. 1395, § 3, and Acts 2009, No. 748, § 6, both added "Aggravated residential burglary, § 5-39-204" to the list of underlying felonies for felony capital murder in subdivision (a)(1)(A) of this section.

Acts 2011, No. 570, § 1, provided: "Legislative intent. The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Amendments. The 2007 amendment, in (a)(1)(A), inserted "§ 5-12-102" in (v), inserted present (vi) and (viii) and redesignated the remaining subdivisions accordingly, substituted "Residential burglary, § 5-39-201(a)" for "Burglary, § 5-39-201" in present (vii), substituted "§§ 5-64-101 – 5-64-508" for §§ 5-64-101 – 5-64-608" in present (ix); substituted "a person" for "one (1) person" in (a)(8); and made related and stylistic changes.

The 2009 amendment by No. 748 inserted present (a)(1)(A)(ix).

The 2009 amendment by No. 1395 inserted present (a)(1)(A)(ix) and redesignated the remaining subdivisions accordingly; and made a minor stylistic change in (a)(1)(B).

The 2011 amendment, in (c)(2), substituted "5-4-307" for "5-4-308, 5-4-310, 5-4-311" and inserted "16-93-307, 16-93-313, and 16-93-314."

RESEARCH REFERENCES

Ark. L. Rev. Article, Ethical and Effective Representation in Arkansas Capital Trials, 60 Ark. L. Rev. 1.

CASE NOTES

Analysis

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Constitutionality.

At the conclusion of the guilt phase of the death-row inmate's trial, the state trial court instructed the jury on the elements of capital murder, subdivision (a)(1) of this section, and first-degree murder, § 5-10-102(a)(1), which were substantively identical because the underlying felony for both offenses was kidnapping; this overlap did not violate due process by risking arbitrary decisionmaking in a capital case. Williams v. Norris, 576 F.3d 850 (8th Cir. 2009).

Accomplice.

Trial court did not err in denying defendant's motion for directed verdict as there was sufficient evidence to support defendant's conviction of the underlying felony, aggravated robbery, and capital-murder, after eliminating the accomplice testimony; other corroborating evidence demonstrated that defendant had the purpose of committing theft with the use of physical force, was armed with a deadly weapon, and caused the death of the victim and, further, a doctor testified that the victim died from a gunshot wound. Gardner v. State, 364 Ark. 506, 221 S.W.3d 339 (2006).

Defendant's conviction for capital murder, in violation of subdivision (a)(4) of this section, was proper because there was substantial evidence that defendant was guilty as an accomplice pursuant to §§ 5-2-401, 5-2-402(2) and 5-2-403(b)(1), (2), and his argument that there was insufficient evidence of his acting as an accomplice by encouraging, aiding, or assisting the killer in stabbing the victim, was not preserved for review. Lawshea v. State, 2009 Ark. 600, — S.W.3d — (2009).

Affirmative Defense.

Trial court did not err by rejecting defendant's argument that the affirmative defense provisions of subsection (b) of this section unconstitutionally shifted the burden of proof to defendant because he failed to meet the high burden of showing that the court's refusal to overrule cases holding that the statute was constitutional would result in great injustice or injury. Jefferson v. State, 372 Ark. 307, 276 S.W.3d 214 (2008).

Aggravating Circumstances.

In the death-row inmate's capital murder trial, the pecuniary gain statutory aggravating factor did not unconstitutionally fail to narrow the class of death-eligible offenders on the ground that it merely duplicated an element of the underlying crime of felony murder during the course of a robbery, because the jury in the inmate's case was not instructed that the felony underlying the charge of capital murder was robbery; rather, the jury was instructed that the underlying felony was kidnapping, pursuant to subdivision (a)(1)(iii) of this section, and that, consistent with the statutory definition of kidnapping under § 5-11-102(a)(3)-(5), it had to find that the inmate had restrained the victim with the purpose of inflicting physical injury upon her or engaging in sexual intercourse or sexual contact, or of committing aggravated robbery or any flight thereafter. After convicting the inmate of capital murder, the jury found in the penalty phase that he committed the murder for pecuniary gain, consistent with § 5-4-604(6); thus, there was no duplication of constitutional dimension or otherwise. Williams v. Norris, 576 F.3d 850 (8th Cir. 2009).

After defendant's conviction of capital murder, the jury that sentenced him to death properly found the existence of aggravating factors involving cruelty and depravity, as evidence that defendant broke into the victim's apartment, waited hours for her to return, and then viciously attacked her as she walked in the door, stabbing her several times, was sufficient to prove the murder was especially cruel or depraved. Marcyniuk v. State, 2010 Ark. 257, — S.W.3d — (2010), rehearing denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 402 (Aug. 6, 2010).

Death Penalty.

In defendant's trial for capital murder, the testimony of the victim's father, two sisters, and one of her children was not unduly prejudicial but rather was relevant to show the impact her death had on her family, which was precisely the purpose envisioned by the Arkansas General Assembly in enacting § 5-4-602(4); thus,

the trial court did not abuse its discretion in admitting victim-impact evidence during defendant's sentencing because such evidence was relevant under the Arkansas capital-murder-sentencing process. Springs v. State, 368 Ark. 256, 244 S.W.3d 683 (2006), cert. denied, 550 U.S. 939, 127 S. Ct. 2257, 167 L. Ed. 2d 1100 (2007).

Where defendant was sentenced to death after his conviction of capital murder, as the jury acknowledged that he suffered from borderline-personality disorder and generalized anxiety disorder but found that those disorders did not prevent from being able to conform his behavior to the law and that he was not under extreme mental or emotional disturbance at the time of the murder, the trial court met its obligation to bring before the jury mitigating factors regarding defendant's mental disease or defect. Marcyniuk v. State, 2010 Ark. 257, — S.W.3d — (2010), rehearing denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 402 (Aug. 6, 2010).

Evidence.

Trial court did not err by denying defendant's motion for a directed verdict on his capital murder conviction because the evidence was sufficient to support defendant's conviction of the underlying felony, aggravated robbery, even after eliminating the testimony of one of defendant's accomplices. Evidence showed that: (1) defendant had the purpose of committing a theft with the use of physical force, as he and three other individuals went to a witness's house to acquire ammunition for their firearm; (2) the fourth individual testified that defendant and three men arrived at his trailer where defendant displayed a gun, and that he provided ammunition for the gun; (3) a second witness, one of the three men who accompanied defendant, testified that he heard two gunshots fired after the two other men left the victim's apartment after the struggle between defendant and the victim ensued; and (4) the chief medical examiner testified that the victim died from a gunshot wound. Gardner v. State, 362 Ark. 413, 208 S.W.3d 774 (2006).

Although the state was required to prove that defendant was in prison when he killed his cell mate to prove capital murder, that element could have been proven by stipulation and the trial court abused its discretion in allowing the state, over defendant's objections, to introduce evidence of his life sentence and convictions for rape, kidnapping, and burglary; the error was harmless, however, as defendant was not prejudiced by the evidence in that the jury did not sentence him to death but, rather, to a second life sentence. Diemer v. State, 365 Ark. 61, 225 S.W.3d 348 (Jan. 26, 2006).

Evidence was sufficient to corroborate an accomplice's testimony and sustain defendant's capital murder and kidnapping convictions where the victim stole defendant's marijuana plants, defendant received a call shortly after the murders to go and help his son clean up a mess and defendant's nephew testified that defendant approached him and told him that if he ever said anything about the victim he would get hurt. Green v. State, 365 Ark. 478, 231 S.W.3d 638 (2006).

Where evidence showed that (1) defendant walked back to the car to retrieve a gun and shot the victim in vital areas, (2) defendant made several inculpatory comments when he went back to the car, and (3) he fled from police, there was sufficient evidence to support a capital murder conviction. Davis v. State, 365 Ark. 634, 232 S.W.3d 476 (2006).

Defendant's conviction for capital murder was supported by substantial evidence where, pursuant to § 5-2-403(b)(1)-(2), he served as an accomplice to the murder by directing his brother to "come on down" from the attic because the victim moved, suggesting that his brother needed to finish killing the victim, which he did while defendant watched. Wilson v. State, 365 Ark. 664, 232 S.W.3d 455 (2006).

Where defendant was convicted of aggravated robbery and capital murder for killing a grocery store owner, the trial court did not err in denying defendant's motion for a directed verdict because the jury did not have to resort to speculation and conjecture as it apparently believed testimony from defendant's four friends concerning his actions and admissions on the night the crimes were committed and the next day when he fled. Whitt v. State, 365 Ark. 580, 232 S.W.3d 459 (2006).

There was sufficient evidence to support convictions for aggravated robbery and capital murder based on defendant's admission that she held the victim's hands

down while he was beaten inside an apartment during an alleged robbery and the testimony of an accomplice waiting outside; the accomplice testimony was sufficiently corroborated. Johnson v. State, 366 Ark. 8, 233 S.W.3d 123 (2006), appeal dismissed, — Ark. —, — S.W.3d —, 2007 Ark. LEXIS 251 (2007).

There was sufficient evidence to support a conviction under subdivision (a)(1) of this section where evidence showed that two murders were committed during a robbery, defendant made inculpatory statements regarding the robbery, the victims had a large amount of cash, and defendant made calls to their phone on the day of the shooting. Harris v. State, 366 Ark. 190, 234 S.W.3d 273 (2006).

Appellant's capital murder conviction was affirmed where a prosecution witness testified numerous times that he saw appellant shoot the victim; that testimony alone was enough to sustain the conviction, and it was for the jury to determine the credibility of another witness whose description of the shooter was inconsistent with that testimony. Gaye v. State, 368 Ark. 39, 243 S.W.3d 275 (2006).

Despite defendant's assertion that a shooting was accidental, a motion for a directed verdict was properly denied because there was sufficient evidence to support a conviction for capital murder under § 5-10-101(a)(4), based on the testimony of witnesses to the crime, a prior threat to kill the victim, and the fact that the victim was shot several times. The evidence showed that defendant went to the victim's apartment, hit her several times, and shot and killed her when friends tried to intervene. Boyd v. State, 369 Ark. 259, 253 S.W.3d 456 (2007).

Evidence was sufficient to sustain a capital murder conviction because defendant was with the victim the night before he was found dead in his recliner, there was blood splatter on his walls, an empty carton was found next to the victim's recliner that described a canister of pepper spray, and when defendant was arrested, a canister of pepper spray was found on defendant's person. The chief forensic DNA examiner testified that blood samples from defendant's jeans matched the genetic profile of the victim. Young v. State, 370 Ark. 147, 257 S.W.3d 870 (2007).

Directed verdict was properly denied because a jury entered a general verdict; therefore, it was impossible which part of this section defendant was convicted under. Since defendant's sufficiency challenge only went to proof of the underlying felony, there was sufficient evidence regarding the other elements of capital murder where defendant shot her husband while he slept and took his property. Terry v. State, 371 Ark. 50, 263 S.W.3d 528 (2007).

Defendant's conviction for capital murder was proper pursuant to subdivisions (a)(1) and (a)(1)(vi) of this section because defendant's own testimony indicated that he stabbed the victim and took his property as part of the same incident. The number of wounds, coupled with the testimony that there were some defensive and post-mortem wounds, was sufficient to show circumstances manifesting defendant's extreme indifference to the value of human life. Young v. State, 371 Ark. 393, 266 S.W.3d 744 (2007).

Defendant's capital-murder conviction in violation of subdivision (a)(4) of this section was appropriate because defendant stabbed the victim repeatedly, walked away, and then returned to stab him again. That testimony, along with other evidence showing the nature, location, and extent of the 45 knife wounds, permitted the jury to reasonably infer that defendant murdered the victim with both premeditation and deliberation. Winston v. State, 372 Ark. 19, 269 S.W.3d 809 (2007).

Evidence supported the notion that the victim's death was caused in the course of the aggravated robbery, and the manner of his death indicated that it was caused under circumstances manifesting extreme indifference to the value of human life; a witness's account of defendant's confession indicated that the victim was crying and pleading for his life before he was killed. Moore v. State, 372 Ark. 579, 279 S.W.3d 69 (2008).

At trial for capital murder and unlawful discharge of a firearm from a vehicle, witnesses' in-court identifications of defendant were not so unreliable that his conviction should be overturned because: (1) the jury clearly found the witnesses and their identifications of defendant credible; (2) defendant did not challenge or object to the witnesses' in-court identi-

fications when they were made, but instead attempted to discredit their testimony on cross-examination; and (3) he merely challenged the in-court identifications in the context of his challenge to the sufficiency of the evidence. Davenport v. State, 373 Ark. 71, 281 S.W.3d 268 (2008).

Evidence was sufficient to convict defendant of capital murder and a terroristic act when a witness, a retired deputy sheriff, described the perpetrator of a shooting, and defendant matched the description; moreover, a witness testified as to a possible motive, and defendant's relative testified that defendant had asked the relative to lie for defendant. Stephenson v. State, 373 Ark. 134, 282 S.W.3d 772 (2008).

Where defendant's friend testified that defendant tried to rob the victim in his truck and shot him when he resisted, defendant's fingerprints were found on the truck and the blood on the gun matched defendant's DNA. Even if the friend was deemed an accomplice for purposes of §§ 5-2-403 and 16-89-111(e)(1)(A), the Supreme Court of Arkansas found sufficient corroborating evidence to support defendant's conviction for capital murder. Bush v. State, 374 Ark. 506, 288 S.W.3d 658 (2008).

Defendant's convictions for two counts of capital murder in violation of former § 41-1501(c) were appropriate because the evidence was sufficient since defendant's former wife testified that defendant was not home on the night in question, that a shotgun was missing, and that defendant told the wife's daughter that she would not have to return to her father's home. The child's father was one of the victims. Wertz v. State, 374 Ark. 256, 287 S.W.3d 528 (2008).

Substantial evidence supported the jury's verdict of premeditated and deliberated capital murder under subdivision (a)(4) of this section where defendant was identified by three separate witnesses as being in the house with the victim moments before the body was discovered and he was seen bending over the location of the body; a knife with the victim's blood on it was found close by the victim's body and defendant's footprints were in the blood at the scene. Sales v. State, 374 Ark. 222, 289 S.W.3d 423 (2008), cert. denied, Sales v. Arkansas, — U.S. —, 129 S. Ct. 2000, 173 L. Ed. 2d 1098 (2009).

Defendant's capital-murder conviction under subdivision (a)(4) of this section was appropriate because he admitted in his statement that he killed the victim and the fact that over a minute elapsed between the shot to the victim's thigh and the shot to the victim's head sufficiently showed premeditation and deliberation. Jackson v. State, 375 Ark. 321, 290 S.W.3d 574 (2009), rehearing denied, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 440 (Feb. 12, 2009).

Defendant's conviction for attempted capital murder, in violation of subdivision (a)(4) of this section and § 5-3-201(a)(2), was supported by the evidence because the victim, defendant's wife, testified that he came into the garage demanding to talk to her, shot her, and commented that she should die; defendant's coworker testified that defendant stated that he was going to shoot his wife if she had any divorce papers. Johnson v. State, 375 Ark. 462, 291 S.W.3d 581 (2009), cert. denied, Johnson v. Arkansas, — U.S. —, 130 S. Ct. 118, 175 L. Ed. 2d 77 (2009).

Defendant's capital-murder convictions in violation of subdivision (a)(4) of this section were appropriate because the evidence was sufficient to support an inference of premeditation and deliberation. One victim was shot multiple times and some of those shots were fired at close range; the other victim's gunshots to his neck originated from behind; and there was no evidence to indicate that defendant's self-defense argument was valid. Wallace v. State, 2009 Ark. 90, 302 S.W.3d 580 (2009).

Where three eyewitnesses testified and identified defendant as the person who fired the shot that killed the victim, his car also matched the description of the car driven by the shooter. The Supreme Court of Arkansas held that the evidence was sufficient to sustain the jury's verdict finding him guilty of murder; the trial court did not err by denying defendant's motion for a directed verdict. Page v. State, 2009 Ark. 112, 313 S.W.3d 7 (2009).

Defendant's convictions for two counts of capital murder in violation of subdivision (a)(4) of this section and two counts of kidnapping in violation of § 5-11-102(a) were appropriate, in part because evidence that defendant possessed a gun similar to that used in the murder was independently relevant proof on the issue

of defendant's identity. Moreover, its probative value was not substantially outweighed by the danger of unfair prejudice. Gilcrease v. State, 2009 Ark. 298, 318 S.W.3d 70 (2009).

Defendant's conviction of capital murder under subdivision (a)(9)(A) of this section was affirmed because the evidence, including testimony from a doctor that victim's injuries were not consistent with defendant's version of events and testimony of sergeant that defendant did not explain events until after he learned of injuries, was sufficient. Jackson v. State, 2009 Ark. 336, 321 S.W.3d 260 (2009), rehearing denied, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 586 (Sept. 10, 2009).

In defendant's capital murder trial arising out of the beating death of the two-year-old child of defendant's girlfriend, the evidence, although circumstantial, was sufficient to support his conviction because it established that the child was in good physical condition when entrusted to defendant's care and that she suffered fatal injuries while in defendant's sole custody. The jury did not err in rejecting defendant's testimony that the child slipped and fell, hitting her head on the floor, because the doctors who treated the child testified that this explanation was implausible and was inconsistent with the head injuries suffered by the child; further, the child suffered extensive injuries over her entire body, and defendant offered no explanation for the origin of the many other significant injuries, which the doctors testified were the result of blunt force trauma. Smith v. State, 2009 Ark. 453, — S.W.3d — (2009).

Evidence was sufficient to show that defendant bound and robbed the victim, that he left her alone in the loft and fled, and that her death was a result of being bound, and defendant clearly intended to restrict the victim's ability to breath and abandon her in a perilous position, which culminated in her death; there was sufficient evidence to prove defendant deliberately engaged in life-threatening behavior. Sykes v. State, 2009 Ark. 522, — S.W.3d — (2009).

There was sufficient evidence that defendant killed a victim in the course and furtherance of a robbery and there was a nexus between the murder and the robbery where after striking both victims, defendant grabbed the robbery victim and demanded money. Norris v. State, 2010 Ark. 174, — S.W.3d — (2010), rehearing denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 292 (May 20, 2010).

In a capital murder prosecution, the trial court did not abuse its discretion by allowing the state to show the jury enlarged photos of the victim's body on a projection screen, as the photos illustrated the crime scene, autopsy photographs were used by the forensic examiner to explain the nature of the injuries and cause of death, and the court examined each photo and applied the proper balancing test. Marcyniuk v. State, 2010 Ark. 257, — S.W.3d — (2010), rehearing denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 402 (Aug. 6, 2010).

Evidence was sufficient to convict defendant of the capital murder of a victim and theft of the victim's vehicle, including eyewitnesses who saw defendant driving the victim's car and saw him with a .45 caliber pistol, the same caliber that was used to kill the victim, at the time of the murder. Lockhart v. State, 2010 Ark. 278, — S.W.3d — (2010).

There was substantial evidence to support the jury's verdict that defendant committed aggravated robbery and capital murder. The state offered proof of defendant's own statements to police investigators that he hit the victim over the head with the poker and then forced him to open the safe; defendant admitted to stabbing the victim in the chest with the poker and slitting his throat with a knife. Such statements all substantiated that the robbery and the murder took place very close in time, which was ample circumstantial proof that defendant intended to commit a robbery. Lacy v. State, 2010 Ark. 388, — S.W.3d — (2010), cert. denied, Lacy v. Arkansas, — U.S. —, — S. Ct. —, 179 L. Ed. 2d 942 (2011).

Defendant's conviction for capital murder, in violation of subdivision (a)(4) of this section, was supported by the evidence because the state presented evidence that defendant had grown weary of the victim's behavior, that defendant was intrigued by the idea of killing someone, that defendant believed the victim would be a good choice because of the victim's personality and circumstances, that defendant purchased a knife, that defendant approached the victim with the knife while the victim was passed out, and that

defendant stabbed the victim five times. Pearcy v. State, 2010 Ark. 454, — S.W.3d — (2010).

Defendant's conviction for capital murder under subdivision (a)(4) of this section was supported by substantial evidence that included witness testimony that he had been looking for a victim on the day he was killed, he was in possession of a handgun, and he made threats against the victim. Evans v. State, 2011 Ark. 33, — S.W.3d — (2011).

Indictment or Information.

There was no violation of § 16-85-407 when an information in a capital murder trial was amended a few days before trial to include a premeditation and deliberation element because defendant was not surprised by such; her own admissions showed that she acted in a premeditated and deliberative manner when she shot her husband as he slept, she had wanted to leave for a long time, and she fled with some of his belongings. Therefore, there was nothing wrong with including the premeditation and deliberation elements in the jury instructions. Terry v. State, 371 Ark. 50, 263 S.W.3d 528 (2007).

Indifference to Human Life.

Denial of defendant's motion for directed verdict on capital murder and aggravated murder charges under this section and §§ 5-12-102 and 5-12-103 was proper as the evidence showed that defendant held a pistol, a deadly weapon, and that he committed theft while armed with the pistol; the evidence also showed that he caused the death of the victim in immediate flight from the aggravated robbery under circumstances manifesting extreme indifference to the value of human life. Flowers v. State, 373 Ark. 119, 282 S.W.3d 790 (2008).

Instructions.

In addition to instructions on the elements of capital murder, the jury was instructed on lesser included offenses of first-degree murder, second-degree murder, and manslaughter, and defendant not assert that the model jury instructions inaccurately reflected the law; thus, despite his contention that his proffered instructions were more inclusive and a more clear statement of the law on the various issues, the trial court did not err in refusing to submit them to the jury in his capital murder case. Adams v. State, 2009 Ark. 375, 326 S.W.3d 764 (2009), rehearing denied, Adams v. State, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 556 (Sept. 10, 2009), cert. denied, Adams v. Arkansas, — U.S. —, 130 S. Ct. 1922, 176 L. Ed. 2d 392 (2010).

Intent.

To be guilty of capital murder under subdivision (a)(10) of this section, defendant's conduct evidencing a purposeful mental state was his firing a gun from his vehicle toward the vehicle of three acquaintances with the knowledge that the target vehicle was occupied. It was not required that he acted purposely with regard to killing of the victim. Price v. State, 373 Ark. 435, 284 S.W.3d 462 (2008).

Judicial Review.

Trial court did not err by denying defendant's motion for a directed verdict on the capital murder charge because: (1) but for defendant's aggravated robbery, speeding, and fleeing from the police, the trooper would not have been in the roadway attempting to retrieve stop sticks and would not have been struck by another trooper's vehicle; (2) the state presented sufficient evidence that defendant acted under circumstances manifesting an extreme indifference to the value of human life, as it showed that defendant robbed the victim with a gun, fled with his accomplice and the loot in a stolen car on a busy interstate, and initiated a high-speed chase while being pursued by several law enforcement officers with their lights and sirens blaring, thereby engaging in life-threatening activity; and (3) the phrase "under circumstances manifesting extreme indifference to the value of human life" was not void for vagueness, as the cases interpreting the phrase provided fair warning that it involved a life-threatening activity. Jefferson v. State, 372 Ark. 307, 276 S.W.3d 214 (2008).

Jurisdiction.

Defendant's contention that the evidence was insufficient to prove that the murder took place in Arkansas was rejected as, although evidence showed that the victim's body was found in Oklahoma, and there was no positive evidence presented that the crime actually occurred outside of Arkansas; the record provided

ample substantial evidence that, at the very least, the premeditation and deliberation element of capital murder and kidnapping by deception occurred in Arkansas. Smith v. State, 367 Ark. 274, 239 S.W.3d 494 (2006).

Lesser Included Offenses.

Trial court did not err in refusing to give a jury instruction concerning different criminal liabilities of co-defendants because the jury found defendant guilty of capital murder, even though it had been instructed on the lesser included offenses of first and second-degree murder; thus, any error in failing to give a manslaughter or negligent homicide instruction was cured.Vidos v. State, 367 Ark. 296, 239 S.W.3d 467 (2006).

Circuit court erred in instructing the jury on felony manslaughter as a lesser included offense of capital felony murder, because the "extreme indifference" element was not a culpable mental state relating to a specific homicide victim but merely described the dangerous circumstances generally set in motion by defendant, and since the "extreme indifference" standard was not a mens rea related to a specific victim, it could not support a lesser included offense based on a less culpable mental state; the sole mens rea element in capital felony murder and first degree felony murder related to the underlying felony and not to the homicide itself. Perry v. State, 371 Ark. 170, 264 S.W.3d 498 (2007).

Prohibition against double jeopardy was not violated when defendant was convicted of aggravated robbery and attempted capital murder because the robbery was the underlying felony, and aggravated robbery was not the lesser included offense of attempted capital murder. Clark v. State, 373 Ark. 161, 282 S.W.3d 801 (2008).

Aggravated robbery is not a lesser included offense of attempted capital murder because, while an aggravated-robbery charge shares the intent to rob with attempted capital murder, aggravated robbery also requires one of three other elements. Two of those elements, being armed with a deadly weapon, or representing as such, are unique to aggravated robbery, and the third possible element of aggravated robbery is having inflicted or attempted to inflict death or serious physical injury upon another, which is not equivalent to the element in attempted capital murder that a defendant, in the course of or in flight from such robbery, caused the death of a person under circumstances manifesting extreme indifference to the value of human life. Clark v. State, 373 Ark. 161, 282 S.W.3d 801 (2008).

Miranda Warnings.

With respect to a defendant convicted of capital murder, the trial court did not err in finding that defendant knowingly, voluntarily, and intelligently waived his Miranda rights because: (1) two police officers contradicted defendant's assertion that he was in no condition to make any kind of statement and that he did not understand his Miranda rights, and (2) the trial judge himself had listened to the tape of the interview and so was able to hear for himself whether or not defendant sounded as if he were impaired. Reese v. State, 371 Ark. 1, 262 S.W.3d 604 (2007).

Premeditation and Deliberation.

There was substantial evidence for the jury to conclude that defendant made a premeditated and deliberate choice to shoot and kill the victim, thus, the trial court did not err by denying defendant's motion for a directed verdict; there was testimony that defendant had possession of the weapon that was used to kill the victim, that defendant had a motive to kill him, and that the shots at the victim were intentional and not random shots into the building. Weston v. State, 366 Ark. 265, 234 S.W.3d 848 (2006).

With respect to a defendant convicted of capital murder, there was sufficient evidence of premeditation and deliberation because: (1) evidence showed that the defendant shot the victim four times, including three shots to the head; (2) the nature and location of gunshot wounds were evidence that the jury could have relied on to infer that the defendant acted with premeditation and deliberation; and (3) there was direct evidence that the defendant stated repeatedly that he intended to kill the victim. Reese v. State, 371 Ark. 1, 262 S.W.3d 604 (2007).

Defendant who stabbed a victim multiple times with a long knife could not be found guilty of aggravated robbery absent evidence that he was trying to get money

in addition to money that he had lost to the victim by gambling. His felony-capital murder charge based on the robbery was likewise reversed; however, his premeditated and deliberate purpose capital murder conviction was upheld. Daniels v. State, 373 Ark. 536, 285 S.W.3d 205 (2008), superseded by statute as stated in, Heard v. State, 2009 Ark. 546, — S.W.3d — (2009).

Substantial evidence was presented to the jury to support a capital murder verdict under subdivision (a)(4) of this section and a finding that defendant murdered the victim with premeditation and deliberation, given that (1) a witness testified to seeing defendant and the victim fighting, then they split up, then defendant went back inside his house a second time before emerging with a shotgun, (2) as the victim began to drive away, defendant fired, and (3) the victim's death was caused by the shotgun pellet; the court rejected defendant's claim that the trial court erred in denying his motions for a directed verdict. Adams v. State, 2009 Ark. 375, 326 S.W.3d 764 (2009), rehearing denied, Adams v. State, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 556 (Sept. 10, 2009), cert. denied, Adams v. Arkansas, — U.S. —, 130 S. Ct. 1922, 176 L. Ed. 2d 392 (2010).

Defendant's conviction of capital murder was upheld, as evidence that he stalked the victim; broke into her apartment and waited for her for hours; stabbed her when she opened the door; violently struggled with her while she begged for her life; hid her body and fled, was sufficient to establish premeditation and deliberation under subdivision (a)(4) of this section. Marcyniuk v. State, 2010 Ark. 257, — S.W.3d — (2010), rehearing denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 402 (Aug. 6, 2010).

Sentence.

Prisoner's challenge to his sentence for capital murder, which was brought pursuant to former § 16-90-111 (formerly Ark. Stat. Ann. § 43-2314), made no argument that the sentence of life imprisonment without parole exceeded the statutory maximum for capital murder; the prisoner was originally tried in 1975 for capital felony murder under § 41-4702, and at that time, capital felony murder was punishable by either death or life imprisonment without parole pursuant to § 41-4706. As the sentence imposed did not exceed the statutory maximum for the stated offense, it was not illegal on its face; thus, the prisoner failed to show that he was entitled to relief. Dyas v. State, — Ark. —, — S.W.3d —, 2007 Ark. LEXIS 650 (Dec. 6, 2007).

Trial Proceedings.

Denial of defendant's motion for a brain injury examination did not deprive defendant of a basic tool for his defense as defendant was examined by a psychologist and he failed to object to the admission of the psychologist's report into evidence; defendant could not assert that failure to appoint a head-injury expert rose to the level of protection afforded by the third Wicks exception as (1) defendant was given an opportunity by the trial court to renew the motion for an appointment of the expert but he failed to do so, (2) it was not the trial court's duty to adequately prepare and present defendant's defense, and (3) defendant's argument could not be reviewed as an issue that fell within the purview of Ark. R. App. P. Crim. 10(b)(iv) because it was not a serious error requiring the trial court to intervene and issue an admonition or declare a mistrial. Springs v. State, 368 Ark. 256, 244 S.W.3d 683 (2006), cert. denied, 550 U.S. 939, 127 S. Ct. 2257, 167 L. Ed. 2d 1100 (2007).

Mistrial should have been granted at a trial for capital murder pursuant to this section because a witness testified that defendant had previously been convicted of terroristic threatening for an incident involving the murder victim. Though there was no proof that defendant had been convicted of terroristic threatening, the state received the benefit of prejudicial testimony, and the statement was so prejudicial that it could not be cured by an admonition to the jury. Williams v. State, 2010 Ark. 89, — S.W.3d — (2010).

Underlying Felony.

There was substantial evidence that defendant committed felony capital murder, subdivision (a)(1) of this section, where the victim was a frail, disabled man who could not defend himself and this constituted substantial evidence that defendant killed the victim under circumstances manifesting extreme indifference to the value of human life and that he robbed the

victim while armed with a deadly weapon and that he inflicted death in the course of that robbery. Sales v. State, 374 Ark. 222, 289 S.W.3d 423 (2008), cert. denied, Sales v. Arkansas, — U.S. —, 129 S. Ct. 2000, 173 L. Ed. 2d 1098 (2009).

Cited: Rhodes v. State, 2009 Ark. App. 665, — S.W.3d — (2009).

5-10-102. Murder in the first degree.

RESEARCH REFERENCES

Ark. L. Rev. Article, Ethical and Effective Representation in Arkansas Capital Trials, 60 Ark. L. Rev. 1.

CASE NOTES

Analysis

Constitutionality.
Construction.
Attempted Murder.
Evidence.
Furtherance or Perpetration of Felony.
Instructions.
Intent.
—Evidence.
Sentence.
Serious Physical Injury.

Constitutionality.

At the conclusion of the guilt phase of the death-row inmate's trial, the state trial court instructed the jury on the elements of capital murder, § 5-10-101(a)(1), and first-degree murder, subdivision (a)(1) of this section, which were substantively identical because the underlying felony for both offenses was kidnapping; this overlap did not violate due process by risking arbitrary decisionmaking in a capital case. Williams v. Norris, 576 F.3d 850 (8th Cir. 2009).

Construction.

Circuit court erred in instructing the jury on felony manslaughter as a lesser included offense of capital felony murder, because the "extreme indifference" element was not a culpable mental state relating to a specific homicide victim but merely described the dangerous circumstances generally set in motion by defendant, and since the "extreme indifference" standard was not a mens rea related to a specific victim, it could not support a lesser included offense based on a less culpable mental state; the sole mens rea element in capital felony murder and first degree felony murder related to the underlying felony and not to the homicide itself. Perry v. State, 371 Ark. 170, 264 S.W.3d 498 (2007).

Attempted Murder.

Evidence was sufficient to sustain defendant's conviction for attempted first-degree murder under § 5-3-201(a)(2) and subdivision (a)(1) of this section as the evidence demonstrated that defendant, in the process of fleeing a store that he had just robbed at gunpoint, shot at a police officer two times. A jury could reasonably conclude that the act of shooting at someone was a substantial step toward causing that person's death. Lambert v. State, 2011 Ark. App. 258, — S.W.3d — (2011).

Evidence.

There was sufficient evidence to establish that defendant acted with the purpose of causing the death of the victim; there was eyewitness testimony and the fact that defendant confessed the murder, plus third-party testimony placed defendant at the crime scene. Price v. State, 365 Ark. 25, 223 S.W.3d 817 (2006).

Trial court did not err in admitting juvenile defendant's confession to police officer as the transcript of the interview revealed that no assurance had been given regarding defendant being tried under the juvenile code; to the contrary, the transcript showed that the confession was given of defendant's own free will. Holland v. State, 365 Ark. 55, 225 S.W.3d 353 (2006).

Evidence was sufficient to convict defendant of first degree murder and theft where, in addition to the testimony of defendant's wife, who was an accomplice,

defendant's own statements to the police, his conduct before and after the crime, and statements of the victim's friends regarding her fear of defendant tended to connect him to the crimes; further, although there was no evidence that defendant ever drove victim's Cadillac or had the vehicle in his possession, the jury might have determined that defendant facilitated the theft by leaving the accomplice without a vehicle at the victim's house, and there was evidence that the theft of the Cadillac was part of the plan to murder the victim. MacKool v. State, 365 Ark. 416, 231 S.W.3d 676 (2006).

There was substantial evidence to support defendant's convictions where one victim had an order of protection against defendant, he owned a gun that was consistent with the murder weapon, and he was seen the night of crime carrying a bag where he kept the gun; further, after the victim filed for divorce, defendant became increasingly obsessed with her, and a witness saw a fight between defendant and the victim and testified that defendant stated that he would rather see the victim dead than with another man. Brunson v. State, 368 Ark. 313, 245 S.W.3d 132 (Dec. 14, 2006).

Evidence was sufficient to sustain defendant's first degree murder conviction because defendant had a key to the victim's apartment, he admitted that he was at the apartment on the evening of the murder, defendant purchased drugs that night and told the seller that he had "busted a some-bitch's head," and defendant lied to the police during the investigation. Dunn v. State, 371 Ark. 140, 264 S.W.3d 504 (2007).

Evidence was sufficient to sustain a first degree murder conviction because defendant admitted to hitting, kicking, and stabbing the victim, a knife blade was found at the crime scene, and a matching handle was later found at defendant's house, and defendant's statement to the investigating officer indicated that his conscious object was to cause the death of the victim. Navarro v. State, 371 Ark. 179, 264 S.W.3d 530 (2007).

Sufficient evidence supported defendant's convictions for first-degree murder under subsection (a) of this section, and aggravated robbery under § 5-12-103(a), including the testimony of several witnesses who saw defendant with the victim's car, as well as the testimony of two witnesses who saw defendant drive the car under the bridge where the victim's body was found and return without the victim in the car. Defendant told one witness that he intended to kill the victim and steal his car, and after the murder he boasted about shooting the victim and showed two witnesses the bullet he found in the victim's car; the bullet he was carrying was consistent with the suspected murder weapon, and the victim's blood was found on his clothing. Boldin v. State, 373 Ark. 295, 283 S.W.3d 565 (2008).

Where defendant picked his ex-wife up from work, drove her to a bridge, stabbed her, threw her to the ground, and pushed her into the water, the evidence was sufficient to support his conviction for attempted first-degree murder in violation of subdivision (a)(2) of this section and § 5-3-201(a)(2). Jones v. State, 2009 Ark. App. 135, — S.W.3d — (2009).

Where defendant confessed and the state's witnesses testified that she shot two victims while they were sitting in her rental car, defendant fled the scene with blood on her hands; parts from a gun were found where she was hiding. The evidence was sufficient to support her conviction for two counts of first-degree murder in violation of subdivision (a)(2) of this section; defendant received consecutive sentences totaling sixty years in prison. Boyce-Reid v. State, 2009 Ark. App. 576, — S.W.3d — (2009).

Where the state's witness testified that she and defendant drove to the victim's RV in order to rob the victim, defendant entered the residence, grabbed the victim's wallet, handed it to the witness, and then she heard a pop sound; a second witness testified that he had seen defendant with a handgun that day, and defendant told him that he had shot the victim in the head. After the victim was found dead, defendant was convicted of first degree felony murder in violation of subdivision (a)(1) of this section with theft as the underlying felony under § 5-36-103; because defendant did not file a motion for a directed verdict challenging the sufficiency of the evidence supporting his conviction for first degree felony murder, the issue was not preserved for review. Lockhart v. State, 2009 Ark. App. 587, — S.W.3d — (2009).

Evidence was sufficient to support defendant's conviction of first-degree murder for the killing of a romantic rival and to establish the requisite intent of purposefulness because it showed that defendant, while possessing a knife, drove to the victim's residence, confronted her, and stabbed her with the knife in the ensuing altercation. Mooney v. State, 2009 Ark. App. 622, 331 S.W.3d 588 (2009), review denied, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 820 (Dec. 10, 2009).

Appellant's conviction for first-degree murder in the death of his three-year-old niece was affirmed where (1) a rape kit indicated pubic hair on the victim's genitalia, and that pubic hair was found by Y-chromosome profiling to match appellant and any of his paternally related male relatives and there was no testimony that appellant's father or his brothers had been around the victim; and (2) the medical examiner testified that the victim could not have sustained such blunt-force trauma injuries and continued to play like a normal child, that she would have become lethargic and passed out. Smith v. State, 2010 Ark. App. 135, — S.W.3d — (2010), rehearing denied, — Ark. App. —, — S.W.3d —, 2010 Ark. App. LEXIS 286 (Mar. 31, 2010).

While there was no testimony that anyone saw defendant at the scene or with a gun, evidence was sufficient to convict defendant of aggravated robbery, under § 5-12-103, and first-degree murder, under subdivision (a)(1) of this section, as it showed defendant had access to a gun, the car defendant was driving that night was at the scene, and the victim's condition suggested a robbery. Bates v. State, 2010 Ark. App. 417, — S.W.3d — (2010).

Trial court did not err by denying defendant's motions for a directed verdict because substantial evidence supported his conviction, as there was evidence that: (1) defendant had prior knowledge of his wife's affair with the victim and investigated the victim's background; (2) defendant waited in his truck after arriving at the store until the victim and his wife were standing by their vehicles; and (3) defendant fired multiple shots, chased the victim, and stood over him to deliver a final shot to the head. James v. State, 2010 Ark. 486, — S.W.3d — (2010).

Evidence was sufficient to convict defendant of first-degree murder under subdivision (a)(2) of this section, as a criminologist confirmed that gunshot residue was found on defendant's clothing, and the intent necessary for first-degree murder could be inferred from the type of weapon used and the nature and extent of the victim's wounds. Gill v. State, 2010 Ark. App. 524, — S.W.3d — (2010).

Trial court did not err in denying defendant's motion for a directed verdict during a trial for first-degree murder as an accomplice, in violation of subdivision (a)(2) of this section and § 5-2-403(a)(1), because a codefendant testified that defendant hired the codefendant to murder his wife; the state presented the testimony of five witnesses concerning the fear of defendant's wife that he would kill her. Camp v. State, 2011 Ark. 155, — S.W.3d — (2011).

Furtherance or Perpetration of Felony.

Where defendant and his accomplices fired gunshots seven or eight minutes after robbing two men, they fled in the murder victim's car to avoid being arrested. The jury was free to find that the murder occurred in the course of the aggravated robbery; therefore, the evidence was sufficient to support defendant's conviction for first-degree felony murder under this section. Rhodes v. State, 2009 Ark. App. 665, — S.W.3d — (2009).

Instructions.

In addition to instructions on the elements of capital murder, the jury was instructed on lesser included offenses of first-degree murder, second-degree murder, and manslaughter, and defendant not assert that the model jury instructions inaccurately reflected the law; thus, despite his contention that his proffered instructions were more inclusive and a more clear statement of the law on the various issues, the trial court did not err in refusing to submit them to the jury in his capital murder case. Adams v. State, 2009 Ark. 375, 326 S.W.3d 764 (2009), rehearing denied, Adams v. State, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 556 (Sept. 10, 2009), cert. denied, Adams v. Arkansas, — U.S. —, 130 S. Ct. 1922, 176 L. Ed. 2d 392 (2010).

Intent.

Defendant convicted of first degree murder under subsection (a) of this section

failed to preserve his complaint that the evidence of intent was insufficient by failing to make a motion for directed verdict at the close of the state's case and at the close of all the evidence, as required by Ark. R. Crim. P. 33.1. Brown v. State, 374 Ark. 324, 287 S.W.3d 587 (2008).

As defendant hit the victim (his ex-wife's mother) in the head with the baseball bat and cut the victim's throat, threatened his ex-wife, and forced her to go with him from the scene of the crime, the evidence was sufficient to convict defendant of first-degree murder, kidnapping, and terroristic threatening under subdivision (a)(2) of this section and §§ 5-11-102(a) and 5-13-301(a)(1)(A). Alvard v. State, 2011 Ark. App. 160, — S.W.3d — (2011).

—Evidence.

There was sufficient evidence for the jury to determine that defendant had the requisite mens rea for first-degree murder at the time he shot and killed his wife as an expert for the state testified that defendant did not have a mental disease or defect at the time of the shooting; the jury was entitled to believe the State's expert over defendant's expert. Davis v. State, 368 Ark. 401, 246 S.W.3d 862 (2007).

Circuit court did not err by admitting into evidence photographs of the murder victim because her wounds were relevant to show defendant's intent to kill her; they also assisted the jury in understanding the crime-scene investigator's description of the scene, and the circuit court performed a proper evaluation of the photographs before allowing them to be presented to the jury. Davis v. State, 368 Ark. 401, 246 S.W.3d 862 (2007).

Sentence.

Because defendant was unable to show that he was prejudiced by his 40 year sentence for first-degree murder, as it was less than the maximum possible sentence for his conviction, the court did not consider his claim that his due process rights were violated by the admission of a photographic history of the victim's life during sentencing. Tate v. State, 367 Ark. 576, 242 S.W.3d 254 (2006).

Serious Physical Injury.

Sufficient evidence supported the conclusion that a defendant intended to cause serious physical harm to a victim: a witness testified that the witness gave defendant a gun, other witnesses testified that defendant shot the victim with that gun, the victim was shot in the arm and hip, which required surgery, and the victim continued to suffer with pain and impairment as a result of the injuries. Hawkins v. State, 2009 Ark. App. 675, — S.W.3d — (2009).

Cited: Smith v. State, 2010 Ark. App. 216, — S.W.3d — (2010).

5-10-103. Murder in the second degree.

RESEARCH REFERENCES

Ark. L. Rev. Article, Ethical and Effective Representation in Arkansas Capital Trials, 60 Ark. L. Rev. 1.

CASE NOTES

Analysis

Evidence.
Felony Murder.
Instructions.
Intent.
Lesser Included Offenses.

Evidence.

There was substantial evidence to support defendant's conviction for the second degree murder of his wife. Given the extent of the wife's injuries and the location of those injuries, the jury could reasonably infer that defendant acted either under circumstances manifesting extreme indifference to the value of human life or with the purpose of causing serious physical injury to his wife. Wyles v. State, 368 Ark. 646, 249 S.W.3d 782 (2007).

In a second-degree murder case under this section, defendant's rights under the

federal and state Confrontation Clauses were violated by the admission of an incriminating testimonial statement made by defendant's sister relating to his motive and statement of mind; although the sister was unavailable, defendant did not have an opportunity for cross-examination. Moreover, the statement was not offered for a non-hearsay purpose, and the admission of such was not harmless. Seaton v. State, 101 Ark. App. 201, 272 S.W.3d 854 (2008).

Where defendant took a loaded gun from his vehicle after seeing the victim's group outside a department store and deliberately shot the victim three times at close range, the jury could infer that he knowingly caused the victim's death; the trial court did not abuse its discretion by admitting defendant's statement that he shot the victim, because he wanted to give him an early Christmas present. The statement was probative of defendant's state of mind as well as his lack of remorse; because the evidence was sufficient to support defendant's conviction for second degree murder in violation of subdivision (a)(1) of this section, the trial court did not err by denying his motion for a directed verdict. Vorachith v. State, 2009 Ark. App. 656, — S.W.3d — (2009).

There was sufficient evidence that defendant killed a victim in the course and furtherance of a robbery and there was a nexus between the murder and the robbery where after striking both victims, defendant grabbed the robbery victim and demanded money. Norris v. State, 2010 Ark. 174, — S.W.3d — (2010), rehearing denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 292 (May 20, 2010).

Defendant's conviction for murder in the second degree in violation of subdivision (a)(1) of this section, with a firearm enhancement, was proper because defendant acted knowingly to cause the victim's death under circumstances manifesting extreme indifference to the value of human life. The issues involved credibility and it was presumed that a person intended the natural and probable consequences of his or her acts; defendant shot her husband in the wrist with a handgun, he bled to death as a result of the wound, and additional evidence indicated that the fatal wound was defensive in nature. Johnson v. State, 2010 Ark. App. 153, — S.W.3d — (2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 257 (May 6, 2010).

Defendant's conviction for the second-degree murder of his wife, in violation of subsection (a) of this section, was supported by the evidence because an accident-reconstruction expert testified that the wife's car sustained body damage consistent with it being pushed into the water by defendant's all-terrain vehicle; a medical examiner concluded that she did not drown because she was already deceased before her body entered the water. Holloway v. State, 2010 Ark. App. 767, — S.W.3d — (2010).

Felony Murder.

Where defendant and his accomplices fired gunshots seven or eight minutes after robbing two men, they fled in the murder victim's car to avoid being arrested. The jury was free to find that the murder occurred in the course of the aggravated robbery committed in violation of this section; therefore, the evidence was sufficient to support defendant's conviction for first-degree felony murder under § 5-10-102. Rhodes v. State, 2009 Ark. App. 665, — S.W.3d — (2009).

Instructions.

In addition to instructions on the elements of capital murder, the jury was instructed on lesser included offenses of first-degree murder, second-degree murder, and manslaughter, and defendant not assert that the model jury instructions inaccurately reflected the law; thus, despite his contention that his proffered instructions were more inclusive and a more clear statement of the law on the various issues, the trial court did not err in refusing to submit them to the jury in his capital murder case. Adams v. State, 2009 Ark. 375, 326 S.W.3d 764 (2009), rehearing denied, Adams v. State, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 556 (Sept. 10, 2009), cert. denied, Adams v. Arkansas, — U.S. —, 130 S. Ct. 1922, 176 L. Ed. 2d 392 (2010).

Intent.

In a case in which defendant was convicted of the second degree murder of his wife, the jury could infer defendant's guilt from his efforts to conceal the crime from the authorities and his family and friends. Defendant concealed the killing of his wife by burying her, covering her grave with a

barrel and sod, and storing her personal belongings in his storage unit. Wyles v. State, 368 Ark. 646, 249 S.W.3d 782 (2007).

Lesser Included Offenses.

Aggravated robbery is not a lesser included offense of attempted capital murder because, while an aggravated-robbery charge shares the intent to rob with attempted capital murder, aggravated robbery also requires one of three other elements. Two of those elements, being armed with a deadly weapon, or representing as such, are unique to aggravated robbery, and the third possible element of aggravated robbery is having inflicted or attempted to inflict death or serious physical injury upon another, which is not equivalent to the element in attempted capital murder that a defendant, in the course of or in flight from such robbery, caused the death of a person under circumstances manifesting extreme indifference to the value of human life. Clark v. State, 373 Ark. 161, 282 S.W.3d 801 (2008).

Prohibition against double jeopardy was not violated when defendant was convicted of aggravated robbery and attempted capital murder because the robbery was the underlying felony, and aggravated robbery was not the lesser included offense of attempted capital murder. Clark v. State, 373 Ark. 161, 282 S.W.3d 801 (2008).

5-10-104. Manslaughter.

(a) A person commits manslaughter if:

(1)(A) The person causes the death of another person under circumstances that would be murder, except that he or she causes the death under the influence of extreme emotional disturbance for which there is reasonable excuse.

(B) The reasonableness of the excuse is determined from the viewpoint of a person in the actor's situation under the circumstances as the actor believed them to be;

(2) The person purposely causes or aids another person to commit suicide;

(3) The person recklessly causes the death of another person; or

(4) Acting alone or with one (1) or more persons:

(A) The person commits or attempts to commit a felony; and

(B) In the course of and in furtherance of the felony or in immediate flight from the felony:

(i) The person or an accomplice negligently causes the death of any person; or

(ii) Another person who is resisting the felony or flight causes the death of any person.

(b) It is an affirmative defense to any prosecution under subsection (a)(4) of this section for an offense in which the defendant was not the only participant that the defendant:

(1) Did not commit the homicidal act or in any way solicit, command, induce, procure, counsel, or aid the homicidal act's commission;

(2) Was not armed with a deadly weapon;

(3) Reasonably believed that no other participant was armed with a deadly weapon; and

(4) Reasonably believed that no other participant intended to engage in conduct which could result in death or serious physical injury.

(c) Manslaughter is a Class C felony.

History. Acts 1975, No. 280, § 1504; A.S.A. 1947, § 41-1504; Acts 2007, No. 827, § 21.

Amendments. The 2007 amendment substituted "actor's" for "defendant's" in (a)(1)(B), and made stylistic changes.

RESEARCH REFERENCES

Ark. L. Rev. Recent Development: Arkansas Criminal Law — Felony Manslaughter as a Lesser-Included Offense, 60 Ark. L. Rev. 1017.

U. Ark. Little Rock L. Rev. Annual Survey of Case Law: Criminal Law, 29 U. Ark. Little Rock L. Rev. 849.

CASE NOTES

Analysis

Evidence.
Extreme Emotional Disturbance.
Instructions.
Lesser Included Offenses.
Provocation, Justification, Etc.
Reckless Driving.
Underlying Felonies.

Evidence.

Evidence was sufficient to sustain defendant's convictions for manslaughter because two people in a motor home were killed when defendant drove a fully loaded commercial vehicle weighing over 82,000 pounds, while under the influence of methamphetamine, into the oncoming-traffic lane, striking the motor home, and ultimately driving through it. Defendant never attempted to brake prior to the accident or to return to the proper lane of traffic. Hoyle v. State, 371 Ark. 495, 268 S.W.3d 313 (2007), rehearing denied, — Ark. —, — S.W.3d —, 2008 Ark. LEXIS 12 (Jan. 10, 2008).

Trial court did not err in convicting defendant of manslaughter in violation of subdivision (a)(3) of this section because the state presented sufficient evidence to corroborate defendant's confession since the corpus delicti rule, § 16-89-111(d), required a showing that the crime occurred, and the state made the requisite showing; the evidence showed that the victim died hours after defendant admittedly went to his apartment, that the victim's apartment was in a state of disarray, which could have been interpreted as circumstantial evidence of a struggle, that blood was found in an area not in the immediate vicinity of where the victim ultimately passed away, and that the medical examiner would have ruled the victim's death a homicide had he known that he had been punched in the head five times. Freeman v. State, 2010 Ark. App. 90, — S.W.3d — (2010).

Extreme Emotional Disturbance.

Where the evidence at defendant's murder trial showed defendant drove up to the victim's house, the victim approached the car and the two spoke briefly, defendant pulled out a gun, the victim began backing away, and defendant shot and killed the victim, the trial court did not err in refusing to instruct the jury on the lesser-included offense of manslaughter because the facts failed to demonstrate an extreme emotional disturbance for which there was a reasonable excuse; although defendant testified that statements made by the victim on a prior occasion and the victim's failure to run when defendant pulled out his gun led him to believe that the victim was armed, the evidence showed that defendant was the one who approached the victim and that their initial contact was a mere exchange of words in normal voices. Defendant's perceived threat in this situation did not provide a reasonable excuse for him to shoot the victim under a claim of extreme emotional disturbance because it was clear that defendant was free to drive away at any time; further, the victim was backing away from the car when defendant began to shoot, and he was unarmed. Taylor v. State, 2009 Ark. App. 627, 331 S.W.3d 597 (2009).

Instructions.

Defendant's capital-murder conviction was appropriate and there was no basis for giving the jury defendant's requested manslaughter instruction, per subdivision (a)(1) of this section. Although defendant argued that there was evidence that he

was provoked to shoot the victim, defendant pointed to no evidence that the victim's actions in fighting defendant's brother were calculated to provoke defendant to take action. Jackson v. State, 375 Ark. 321, 290 S.W.3d 574 (2009), rehearing denied, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 440 (Feb. 12, 2009).

In addition to instructions on the elements of capital murder, the jury was instructed on lesser included offenses of first-degree murder, second-degree murder, and manslaughter, and defendant not assert that the model jury instructions inaccurately reflected the law; thus, despite his contention that his proffered instructions were more inclusive and a more clear statement of the law on the various issues, the trial court did not err in refusing to submit them to the jury in his capital murder case. Adams v. State, 2009 Ark. 375, 326 S.W.3d 764 (2009), rehearing denied, Adams v. State, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 556 (Sept. 10, 2009), cert. denied, Adams v. Arkansas, — U.S. —, 130 S. Ct. 1922, 176 L. Ed. 2d 392 (2010).

Trial court did not err in refusing to instruct the jury on manslaughter as a lesser included offense of first-degree murder because there was no evidence that the victim actually threatened defendant with a gun at the time of the murder and because the only testimony of threats made by the victim against defendant came from defendant's own testimony; even if the court were to accept defendant's self-serving testimony as evidence to support a manslaughter instruction, the threats as testified to by defendant did not provide a basis for the manslaughter instruction because mere threats, where the person making the threats was unarmed and was neither committing nor attempting to commit violence on defendant the time of the killing, were insufficient to lessen defendant's culpability for murder. Where there was no evidence that the victim was armed and no evidence that he was violently assaulting defendant when defendant shot him, defendant failed to establish provocation sufficient to justify his actions; defendant was thus not entitled to a jury instruction on the lesser-included offense of manslaughter. Pollard v. State, 2009 Ark. 434, 336 S.W.3d 866 (2009).

Lesser Included Offenses.

Circuit court erred in instructing the jury on felony manslaughter as a lesser included offense of capital felony murder, because the "extreme indifference" element was not a culpable mental state relating to a specific homicide victim but merely described the dangerous circumstances generally set in motion by defendant, and since the "extreme indifference" standard was not a mens rea related to a specific victim, it could not support a lesser included offense based on a less culpable mental state; the sole mens rea element in capital felony murder and first degree felony murder related to the underlying felony and not to the homicide itself. Perry v. State, 371 Ark. 170, 264 S.W.3d 498 (2007).

Defendant's convictions for manslaughter, in violation of subdivision (a)(3) of this section, were modified to the lesser-included offense of negligent homicide under § 5-10-105(b)(1) because defendant's acts of crossing the center line, tailgating, and averting defendant's eyes from the road constituted negligence, not recklessness under § 5-2-202(3). Rollins v. State, 2009 Ark. App. 110, 302 S.W.3d 617 (2009), rev'd, 2009 Ark. 484, — S.W.3d — (2009).

Provocation, Justification, Etc.

During defendant's trial for attempted murder, the court did not err in refusing to instruct the jury on the lesser-included offense of attempted extreme-emotional-disturbance manslaughter, in violation of subdivision (a)(1)(A) of this section and § 5-3-201(b), because defendant's self-serving testimony was the only evidence of provocation presented; the evidence corroborated the victim's testimony that defendant stabbed the victim with a knife. Townsell v. State, 2010 Ark. App. 754, — S.W.3d — (2010).

Reckless Driving.

Evidence was sufficient to support defendant's convictions of two counts manslaughter stemming from a head-on collision in which two people were killed because it showed that defendant had been driving erratically prior to the crash, had tailgated another driver for 15 miles, drove fast on a curving highway, and crossed over the center line while looking over his shoulder. There was further tes-

timony establishing that defendant did not attempt to stop or swerve as he drove headfirst into the victims' vehicle, and additional proof was presented from which the jury could infer that, at some point within the eight hours proceeding the drawing of defendant's blood four hours after the accident, defendant had ingested cocaine. Rollins v. State, 2009 Ark. 484, — S.W.3d — (2009).

Underlying Felonies.

In a fleeing and manslaughter case where an officer died during a high speed pursuit of defendant, who fled from a store after stealing candy, the trial court did not err by submitting a manslaughter instruction as fleeing under § 5-54-125 was an appropriate underlying felony to support a conviction under this section. Fondren v. State, 364 Ark. 498, 221 S.W.3d 333 (2006).

During defendant's trial, the court properly gave an instruction to the jury regarding manslaughter, in violation of subdivision (4)(A) of this section, after an officer was killed in a high-speed chase because while the manslaughter charge might have arisen from the same events as felony fleeing, in violation of § 5-54-125, the legislature clearly intended that fleeing be punishable as a separate offense. Fondren v. State, 364 Ark. 498, 221 S.W.3d 333 (2006).

Any felony will support a conviction for manslaughter. Fondren v. State, 364 Ark. 498, 221 S.W.3d 333 (2006).

5-10-105. Negligent homicide.

(a)(1) A person commits negligent homicide if he or she negligently causes the death of another person, not constituting murder or manslaughter, as a result of operating a vehicle, an aircraft, or a watercraft:

(A) While intoxicated;

(B)(i) If at that time there is an alcohol concentration of eight hundredths (0.08) or more in the person's breath or blood based upon the definition of breath, blood, and urine concentration in § 5-65-204, as determined by a chemical test of the person's blood, urine, breath, or other bodily substance.

(ii) The method of chemical analysis of the person's blood, urine, or breath shall be made in accordance with §§ 5-65-204 and 5-65-206; or

(C) While passing a stopped school bus in violation of § 27-51-1004.

(2) A person who violates subdivision (a)(1) of this section is guilty of a Class B felony.

(b)(1) A person commits negligent homicide if he or she negligently causes the death of another person.

(2) A person who violates subdivision (b)(1) of this section is guilty of a Class A misdemeanor.

(c) As used in this section, "intoxicated" means influenced or affected by the ingestion of alcohol, a controlled substance, any intoxicant, or any combination of alcohol, a controlled substance, or an intoxicant to such a degree that the driver's reactions, motor skills, and judgment are substantially altered and the driver therefore constitutes a clear and substantial danger of physical injury or death to himself or herself and other motorists or pedestrians.

History. Acts 1975, No. 280, § 1505; A.S.A. 1947, § 41-1505; Acts 1987, No. 538, § 1; 1999, No. 1112, § 1; 2001, No. 561, § 1; 2005, No. 1004, § 1; 2005, No. 2128, § 2; 2009, No. 650, § 1.

Amendments. The 2009 amendment

inserted "or" at the end of (a)(1)(A), and substituted "Class B" for "Class C" in (a)(2).

CASE NOTES

Analysis

Evidence.
Instructions.
Murder or Manslaughter.
Preservation for Review.

Evidence.

Evidence was sufficient to support defendant's conviction of negligent homicide where the jury could conclude that defendant's failure to perceive the risk under the facts constituted a gross deviation from the standard of care that a reasonable person would observe in defendant's position. Utley v. State, 366 Ark. 514, 237 S.W.3d 27 (2006).

Defendant's convictions for manslaughter, in violation of § 5-10-104(a)(3), were modified to the lesser-included offense of negligent homicide under subdivision (b)(1) of this section because defendant's acts of crossing the center line, tailgating, and averting defendant's eyes from the road constituted negligence, not recklessness under § 5-2-202(3). Rollins v. State, 2009 Ark. App. 110, 302 S.W.3d 617 (2009), rev'd, 2009 Ark. 484, — S.W.3d — (2009).

Appellants' convictions for negligent homicide in the death of their daughter were affirmed; given the record—which included appellants allowing three hours to pass without checking on or knowing the whereabouts of their twenty-two-month-old child—the instant court could not say that the verdicts were not supported by substantial evidence. Marin v. State, 2009 Ark. App. 802, — S.W.3d — (2009).

Instructions.

There was no abuse of discretion in a trial court's refusal of defendant's proffered negligent homicide jury instruction because there was no rational basis for the instruction where defendant swung a two-by-four hard at the victim's head and there was no evidence that defendant was unaware that such conduct, or the risk of such conduct, would result in the victim's death. Norris v. State, 2010 Ark. 174, — S.W.3d — (2010), rehearing denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 292 (May 20, 2010).

Murder or Manslaughter.

In defendant's trial for criminally negligent homicide, the trial court erred in failing to grant defendant's motion for directed verdict where the state's evidence that defendant's truck merely crossed the center line of a road was insufficient to support a finding of criminal negligence; this was a different standard from the evidence needed to support a finding of civil negligence. Utley v. State, 93 Ark. App. 381, 219 S.W.3d 709 (2005), rev'd, 366 Ark. 514, 237 S.W.3d 27 (2006).

Petitioner was properly denied relief under 28 U.S.C.S. § 2255 where his prior conviction for negligent homicide was a crime of violence properly used to enhance his sentence under U.S. Sentencing Guidelines Manual § 4B1.2; U.S. v. Booker could not be applied retroactively to his collateral claim. Jernigan v. United States, — F. Supp.2d —, 2005 U.S. Dist. LEXIS 38690 (E.D. Ark. Dec. 8, 2005).

Preservation for Review.

Defendant's conviction for negligent homicide was appropriate because she failed to preserve for appellate review her contention that the judge erred in finding that she engaged in criminally negligent conduct and that the conduct caused the death of the pedestrian victim because the evidence was insufficient to support the conviction. Even though defendant's counsel made a specific argument to the judge, he never asked for dismissal but argued instead that the state had not met its burden of proving negligence, causation, beyond a reasonable doubt; the reasonable-doubt language was associated with a closing argument and not a motion to dismiss under Ark. R. Crim. P. 33.1, where substantial evidence was the test. Grube v. State, 2010 Ark. 171, — S.W.3d — (2010).

5-10-106. Physician-assisted suicide.

(a)(1) As used in this section, "physician-assisted suicide" means a physician or health care provider participating in a medical procedure or knowingly prescribing any drug, compound, or substance for the express purpose of assisting a patient to intentionally end the patient's life.

(2) However, "physician-assisted suicide" does not apply to a person participating in the execution of a person sentenced by a court to death by lethal injection.

(b) It is unlawful for any physician or health care provider to commit the offense of physician-assisted suicide by:

(1) Prescribing any drug, compound, or substance to a patient with the express purpose of assisting the patient to intentionally end the patient's life; or

(2) Assisting in any medical procedure for the express purpose of assisting a patient to intentionally end the patient's life.

(c) Upon conviction, any physician or health care provider violating subsection (b) of this section is guilty of a Class C felony.

(d) Nothing in this section prohibits a:

(1) Physician or health care provider from carrying out an advanced directive or living will; or

(2) Physician from prescribing any drug, compound, or substance for the specific purpose of pain relief.

History. Acts 1999, No. 394, § 1; 2007, No. 827, §§ 22, 23.

Amendments. The 2007 amendment substituted "knowingly" for "willfully" in (a)(1); inserted "Upon conviction" in (c); and made related and stylistic changes.

CHAPTER 11

KIDNAPPING AND RELATED OFFENSES

SECTION.

5-11-101. Definitions.

As used in this chapter:

(1) "Deviate sexual activity" means any act of sexual gratification involving:

(A) The penetration, however slight, of the anus or mouth of a person by the penis of another person; or

(B) The penetration, however slight, of the labia majora or anus of a person by any body member or foreign instrument manipulated by another person;

(2)(A) "Incompetent" means that a person is unable to care for himself or herself because of physical or mental disease or defect.

(B) The status embraced by "incompetent" may or may not exist regardless of any adjudication concerning incompetency;

(3) "Restraint without consent" includes:

(A) Restraint by physical force, threat, or deception; or

(B) In the case of a person who is under fourteen (14) years of age or incompetent, restraint without the consent of a parent, guardian, or other person responsible for general supervision of his or her welfare;

(4) "Sexual contact" means any act of sexual gratification involving the touching, directly or through clothing, of the sex organs, buttocks, or anus of a person or the breast of a female;

(5) "Sexual intercourse" means penetration, however slight, of the labia majora by a penis; and

(6) "Vehicle" means any craft or device designed for the transportation of a person or property across land or water or through the air.

History. Acts 1975, No. 280, § 1701; 1977, No. 360, § 5; A.S.A. 1947, § 41-1701; Acts 2007, No. 827, §§ 24, 25.

Amendments. The 2007 amendment, in (1), substituted "any act of sexual gratification involving" for "the same as defined in § 5-14-101" in the introductory paragraph, and added (A) and (B); substituted "any act of sexual gratification ... breast of a female" for "the same as defined in § 5-14-101" in (4); and substituted "penetration, however slight, of the labia majora by a penis" for "the same as defined in § 5-14-101" in (5).

CASE NOTES

Analysis

Jurisdiction.
Restraint Without Consent.

Jurisdiction.

Defendant's contention that the evidence was insufficient to prove that the murder took place in Arkansas was rejected as, although evidence showed that the victim's body was found in Oklahoma, and there was no positive evidence presented that the crime actually occurred outside of Arkansas; the record provided ample substantial evidence that, at the very least, the premeditation and deliberation element of capital murder and kidnapping by deception occurred in Arkansas. Smith v. State, 367 Ark. 274, 239 S.W.3d 494 (2006).

Restraint Without Consent.

Evidence was sufficient to sustain defendant's kidnapping conviction as the 13 year old victim's mother relied upon the representation that defendant was taking the victim to the movies with his daughter when she gave permission for the victim to leave her home with defendant; the victim's mother did not consent to defendant escorting her daughter to a motel room under the guise of meeting someone briefly before meeting her daughter at the movies. Mitchem v. State, 96 Ark. App. 78, 238 S.W.3d 623 (2006).

Record disclosed that defendant disabled the rape victim's vehicle, hoisted her out of the vehicle, and dragged her into the house; when the victim attempted to escape by running outside, defendant forcibly pulled her back inside the house. While being dragged to the bedroom the victim tried to hang onto door frames, but defendant overcame those efforts as well; therefore, the Court of Appeals of Arkansas held that substantial evidence supported defendant's conviction for kidnapping under § 5-11-102(a)(5) because he restrained the victim for purposes of subdivision (3) of this section. Henson v. State, 2009 Ark. App. 464, 320 S.W.3d 19 (2009).

There was sufficient evidence to support appellant's conviction for kidnapping; appellant substantially interfered with the victim's liberty interest by physically threatening her and impeding her egress from the home. The victim voiced her decision that she was leaving, thus expressing her intention and revoking her consent to remain at appellant's home; appellant then stood up, slammed the door telling the victim that she was not going anywhere and told her to go to his bedroom and when the victim refused,

appellant slapped her and told her that he had a .380 pistol and would kill her if she said anything. Hickey v. State, 2010 Ark. 109, — S.W.3d — (2010).

5-11-102. Kidnapping.

CASE NOTES

Analysis

Elements of Offense.
Evidence.
Indictment or Information.
Jurisdiction.
Lesser Included Offenses.
Restraint.
Sentencing.
Voluntary Release of Victim.

Elements of Offense.

Argument that there was insufficient evidence to support a kidnapping conviction based on a lack of evidence on the element of restraint without consent was not preserved for appellate review because a motion for the directed verdict before the trial court did not raise this issue. Davis v. State, 365 Ark. 634, 232 S.W.3d 476 (2006).

Evidence was sufficient to sustain defendant's conviction for kidnapping where the evidence showed that defendant picked the victim up by her waist and carried her away; defendant's purpose was clearly to cause physical injury or to terrorize. Davis v. State, 368 Ark. 380, 368 Ark. 351, 246 S.W.3d 433 (2007).

In the death-row inmate's capital murder trial, the pecuniary gain statutory aggravating factor did not unconstitutionally fail to narrow the class of death-eligible offenders on the ground that it merely duplicated an element of the underlying crime of felony murder during the course of a robbery, because the jury in the inmate's case was not instructed that the felony underlying the charge of capital murder was robbery; rather, the jury was instructed that the underlying felony was kidnapping, pursuant to § 5-10-101(a)(1)(iii), and that, consistent with the statutory definition of kidnapping under subdivisions (a)(3)-(5) of this section, it had to find that the inmate had restrained the victim with the purpose of inflicting physical injury upon her or engaging in sexual intercourse or sexual contact, or of committing aggravated robbery or any flight thereafter. After convicting the inmate of capital murder, the jury found in the penalty phase that he committed the murder for pecuniary gain, consistent with § 5-4-604(6); thus, there was no duplication of constitutional dimension or otherwise. Williams v. Norris, 576 F.3d 850 (8th Cir. 2009).

Evidence.

Evidence was sufficient to corroborate an accomplice's testimony and sustain defendant's capital murder and kidnapping convictions where the victim stole defendant's marijuana plants, defendant received a call shortly after the murders to go and help his son clean up a mess and defendant's nephew testified that defendant approached him and told him that if he ever said anything about the victim he would get hurt. Green v. State, 365 Ark. 478, 231 S.W.3d 638 (2006).

Evidence was sufficient to sustain defendant's kidnapping conviction as the 13 year old victim's mother relied upon the representation that defendant was taking the victim to the movies with his daughter when she gave permission for the victim to leave her home with defendant; the victim's mother did not consent to defendant escorting her daughter to a motel room under the guise of meeting someone briefly before meeting her daughter at the movies. Mitchem v. State, 96 Ark. App. 78, 238 S.W.3d 623 (2006).

Trial court did not err in sustaining state's objection that the terms of the civil dispute regarding a loan and the collateral for the loan were irrelevant and in refusing to permit defendant to question the victim concerning the property that had been collateral for the loan because, even if the victim had lied regarding the terms of the loan, that would be no defense to the crimes for which he was convicted, which included kidnapping, terroristic threatening, and aggravated assault. Tarpley v. State, 97 Ark. App. 122, 245 S.W.3d 192 (Dec. 13, 2006).

Offense of terroristic threatening required no more than the communication of

a threat, by word or deed, with the purpose of terrorizing the victim, and the offense of aggravated assault was accomplished when defendant displayed the gun and pointed it at the victim; given the testimony that defendant kept the doorway blocked for several minutes after performing those acts and that the victim was prevented from summoning assistance during that time, the evidence was sufficient to sustain the kidnapping conviction. Tarpley v. State, 97 Ark. App. 122, 245 S.W.3d 192 (Dec. 13, 2006).

Evidence was sufficient to sustain defendant's kidnapping conviction where defendant's accomplice testified that defendant killed the victim, and an officer testified that defendant stated that the accomplice attacked the victim, knocked him down, taped him in a chair, and that the victim was "moaning" and "in a bad way" before he died; although there was a discrepancy as to which individual attacked the victim, both statements pointed to defendant's involvement in the victim's murder. Holsombach v. State, 368 Ark. 415, 246 S.W.3d 871 (2007).

Circuit court did not err by admitting into evidence a recording of the kidnapping victim's 911 call as the evidence contained in the recording was relevant to prove the restraint element of the kidnapping offense and to counter defendant's argument that he released the victim; in the call, the victim told the operator the circumstances of the crimes and that she was bound and could not escape, and defendant did not produce any authority to support his position that the 911 recording was unduly prejudicial because the victim's voice was hysterical. Davis v. State, 368 Ark. 401, 246 S.W.3d 862 (2007).

Defendant's convictions for two counts of capital murder in violation of § 5-10-101(a)(4) and two counts of kidnapping in violation of subsection (a) of this section were appropriate, in part because evidence that defendant possessed a gun similar to that used in the murder was independently relevant proof on the issue of defendant's identity. Moreover, its probative value was not substantially outweighed by the danger of unfair prejudice. Gilcrease v. State, 2009 Ark. 298, 318 S.W.3d 70 (2009).

Record disclosed that defendant disabled the rape victim's vehicle, hoisted her out of the vehicle, dragged her into the house, forcibly pulled her back inside the house when the victim attempted to escape, dragged to into the bedroom while the victim tried to hang onto the door frames and forced her to have sexual relations with him; the victim escaped on her own, and defendant did not release her. The Court of Appeals of Arkansas held that substantial evidence supported defendant's conviction for kidnapping under subdivision (a)(5) of this section. Henson v. State, 2009 Ark. App. 464, 320 S.W.3d 19 (2009).

There was sufficient evidence to support appellant's conviction for kidnapping; appellant substantially interfered with the victim's liberty interest by physically threatening her and impeding her egress from the home. The victim voiced her decision that she was leaving, thus expressing her intention and revoking her consent to remain at appellant's home; appellant then stood up, slammed the door telling the victim that she was not going anywhere and told her to go to his bedroom and when the victim refused, appellant slapped her and told her that he had a .380 pistol and would kill her if she said anything. Hickey v. State, 2010 Ark. 109, — S.W.3d — (2010).

As defendant hit the victim (his ex-wife's mother) in the head with the baseball bat and cut the victim's throat, threatened his ex-wife, and forced her to go with him from the scene of the crime, the evidence was sufficient to convict defendant of first-degree murder, kidnapping, and terroristic threatening under subsection (a) of this section and §§ 5-10-102(a)(2) and 5-13-301(a)(1)(A). Alvard v. State, 2011 Ark. App. 160, — S.W.3d — (2011).

Indictment or Information.

State was not erroneously allowed to amend the information charging appellant with three counts of kidnapping based on subdivision (a)(4) of this section after his trial was underway because the additional allegations under subdivisions (a)(3) and (6) of this section in the amended information did not change the nature of the original kidnapping charge, but amended the manner in which the kidnapping took place. Furthermore, appellant was not unfairly surprised by the amendment since a review of the testi-

mony made it clear that he inquired into whether his victims felt terrorized by his actions. Hill v. State, 370 Ark. 102, 257 S.W.3d 534 (2007), appeal dismissed, — Ark. —, — S.W.3d —, 2008 Ark. LEXIS 54 (Jan. 24, 2008).

Jurisdiction.

Defendant's contention that the evidence was insufficient to prove that the murder took place in Arkansas was rejected as, although evidence showed that the victim's body was found in Oklahoma, and there was no positive evidence presented that the crime actually occurred outside of Arkansas; the record provided ample substantial evidence that, at the very least, the premeditation and deliberation element of capital murder and kidnapping by deception occurred in Arkansas. Smith v. State, 367 Ark. 274, 239 S.W.3d 494 (2006).

Lesser Included Offenses.

Second-degree false imprisonment is not a lesser included offense of kidnapping; thus, instruction on second-degree or first-degree false imprisonment was not required in a kidnapping case. Davis v. State, 365 Ark. 634, 232 S.W.3d 476 (2006).

In a kidnapping case, there was no error in the trial judge's failure to instruct the jury on false imprisonment because it was not considered a lesser-included offense to kidnapping. Sweet v. State, 2011 Ark. 20, — S.W.3d — (2011).

Restraint.

In a case alleging rape, kidnapping, and third-degree domestic battery, a sufficiency of the evidence argument was not preserved for review because defendant argued on the first time on appeal that the amount of restraint or force used did not warrant a kidnapping conviction and a third-degree battery conviction in addition to the rape. This was not the same argument raised during a directed verdict motion. Rounsaville v. State, 372 Ark. 252, 273 S.W.3d 486 (2008).

Sentencing.

Where appellant entered negotiated pleas of guilty to kidnapping under this section and additional charges, he was sentenced to 120 months' in prison with an additional 120-month suspended sentence; appellant was not entitled to post-conviction relief under Ark. R. Crim. P. 37.1, because he could not prove that counsel failed to advise him of a possible life sentence under § 5-4-401. On the record, counsel indicated that he had advised appellant that he could be subject to a life sentence if he violated the terms of the suspended sentence. French v. State, 2009 Ark. 443, — S.W.3d — (2009).

Defendant never argued to the trial court that the state's evidence proved a Class B felony kidnapping pursuant to this section, but not Class Y. Accordingly, defendant failed to comply with the requirements of Ark. R. Crim. P. 33.1(a), (c), and the issue was not preserved for appellate review. Sweet v. State, 2011 Ark. 20, — S.W.3d — (2011).

Voluntary Release of Victim.

Circuit did not err by refusing to lower the kidnapping charge from a Class Y to a Class B felony as defendant did not release his stepdaughter where the stepdaughter was left with a mask over her face, a gag in her mouth, her feet bound together, her hands bound behind her back, and was left in a house that was in a rural area with no one expected to be home for several hours; although the stepdaughter found a cellular phone and scissors defendant left for her, she was unable to physically release herself from her restraints. Davis v. State, 368 Ark. 401, 246 S.W.3d 862 (2007).

5-11-103. False imprisonment in the first degree.

CASE NOTES

Lesser Included Offenses.

Second-degree false imprisonment is not a lesser included offense of kidnapping; thus, instruction on second-degree or first-degree false imprisonment was not required in a kidnapping case. Davis v. State, 365 Ark. 634, 232 S.W.3d 476 (2006).

5-11-104. False imprisonment in the second degree.

CASE NOTES

Lesser Included Offenses.

Second-degree false imprisonment is not a lesser included offense of kidnapping; thus, instruction on second-degree or first-degree false imprisonment was not required in a kidnapping case. Davis v. State, 365 Ark. 634, 232 S.W.3d 476 (2006).

CHAPTER 12

ROBBERY

5-12-101. Definition.

CASE NOTES

Physical Force.

Court rejected defendant's argument that the evidence was insufficient to support his conviction of felony robbery under § 5-12-102(a) because the state failed to prove that he used physical force to take the victim's purse where the state presented no evidence of a struggle or fight, of more force than necessary to pull the purse from the victim's arm, or of his touching any part of the victim's body. Because the victim testified that defendant snatched her purse from her, causing pain and bruises to her hand and right arm, the jury could have inferred from this evidence that injury was done, that force was used in taking the purse, and that bodily impact occurred sufficient to meet the statutory requirement of physical force. Banks v. State, 2009 Ark. App. 633, — S.W.3d — (2009).

5-12-102. Robbery.

CASE NOTES

Analysis

Accomplice.
Elements.
Evidence.
Ownership.
Physical Force.
Sentence.
Sufficiency of Evidence.

Accomplice.

Substantial evidence supported defendant's convictions for aggravated robbery, kidnapping, aggravated assault, theft of property, unlawful discharge of a firearm from a vehicle, and fleeing because while the state did not prove that defendant actually entered a bank, it did provide substantial evidence that he was the driver of the getaway car and thus was an accomplice of the two men who committed the aggravated robbery, kidnapping, and theft of property; while defendant did not personally shoot at an officer's vehicle, his conduct of driving the fleeing vehicle while another person in the car fired the shots sufficiently implicated him as an accomplice to unlawfully discharging a firearm from a vehicle. Barber v. State, 2010 Ark. App. 210, — S.W.3d — (2010).

Elements.

In defendant's attempted capital murder case, the state presented substantial evidence of defendant's intent to commit theft because there was the victim's testimony, in which she stated that defendant told her that he was going to rob her, there was the fact that two twenty-dollar bills and some quarters were missing from the store after the attack, and there was also defendant's own videotaped statement in which he admitted to taking money from the cash register. Goodwin v. State, 373 Ark. 53, 281 S.W.3d 258 (2008).

Evidence.

Trial court did not err by denying defendant's motion for a directed verdict on his capital murder conviction because the evidence was sufficient to support defendant's conviction of the underlying felony, aggravated robbery, even after eliminating the testimony of one of defendant's accomplices. Evidence showed that: (1) defendant had the purpose of committing a theft with the use of physical force, as he and three other individuals went to a witness's house to acquire ammunition for their firearm; (2) the fourth individual testified that defendant and three men arrived at his trailer where defendant displayed a gun, and that he provided ammunition for the gun; (3) a second witness, one of the three men who accompanied defendant, testified that he heard two gunshots fired after the two other men left the victim's apartment after the struggle between defendant and the victim ensued; and (4) the chief medical examiner testified that the victim died from a gunshot wound. Gardner v. State, 362 Ark. 413, 208 S.W.3d 774 (2006).

There was sufficient evidence to support convictions for aggravated robbery and capital murder based on defendant's admission that she held the victim's hands down while he was beaten inside an apartment during an alleged robbery and the testimony of an accomplice waiting outside; the accomplice testimony was sufficiently corroborated. Johnson v. State, 366 Ark. 8, 233 S.W.3d 123 (2006), appeal dismissed, — Ark. —, — S.W.3d —, 2007 Ark. LEXIS 251 (2007).

There was sufficient evidence to support a conviction where evidence showed that two murders were committed during a robbery, defendant made inculpatory statements regarding the robbery, the victims had a large amount of cash, and defendant made calls to their phone on the day of the shooting. Harris v. State, 366 Ark. 190, 234 S.W.3d 273 (2006).

Evidence was sufficient to sustain defendant's convictions for aggravated robbery, residential burglary, and felony theft of property because an accomplice testified that he and defendant had a purpose of committing theft when they went to the victim's apartment, defendant used physical force upon the victim, defendant was armed with a deadly weapon, and a witness testified that she observed defendant carry out a television and load it into the car. Navarro v. State, 371 Ark. 179, 264 S.W.3d 530 (2007).

Substantial evidence indicated that defendant was armed with a deadly weapon for the purpose of committing theft, and defendant was part of a plan to take the victim's money; there did not have to be an actual transfer of property to take place for the offense of aggravated robbery to be complete, and defendant and another clearly followed through with the plan, whether or not they verbally acknowledged their agreement at the time the plan was conceived. Moore v. State, 372 Ark. 579, 279 S.W.3d 69 (2008).

Denial of defendant's motion for directed verdict on capital murder and aggravated murder charges under this section and §§ 5-10-101 and 5-12-103 was proper as the evidence showed that defendant held a pistol, a deadly weapon, and that he committed theft while armed with the pistol; the evidence also showed that he caused the death of the victim in immediate flight from the aggravated robbery under circumstances manifesting extreme indifference to the value of human life. Flowers v. State, 373 Ark. 119, 282 S.W.3d 790 (2008).

Defendant's convictions for two counts of aggravated robbery were proper under subsection (a) of this section and § 5-12-103(a) because a neighbor verified that one of the intruders had a gun; the victim told officers that the intruders hid their guns in the closet, where two guns were found; and both intruders were charged in the same instrument, implicating accomplice liability. That provided substantial evidence to support the finding that the intruders at minimum represented by word or conduct that they were armed as a threat in order to commit the theft. Hinton v. State, 2010 Ark. App. 341, — S.W.3d — (2010), rehearing denied, — Ark. App. —, — S.W.3d —, 2010 Ark. App. LEXIS 516 (June 2, 2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 399 (Aug. 6, 2010).

Ownership.

Evidence was sufficient to support defendant's conviction of aggravated robbery under this section where defendant pointed a pistol at the victim and demanded that the victim repay a two dollar debt because the intent to collect a debt at

gunpoint did not negate the necessary intent to steal under § 5-36-103(a)(1). Because defendant could not trace his ownership to the specific bills in the victim's possession, the victim, and not defendant, was the owner of the money in his possession, and it was theft to take it from him. Heard v. State, 2009 Ark. 546, — S.W.3d — (2009).

Physical Force.

Evidence was sufficient to prove the theft element of aggravated robbery; evidence showed that defendant used physical force to at least temporarily deprive victim of her car, which was sufficient proof. Winston v. State, 368 Ark. 105, 243 S.W.3d 304 (2006).

Directed verdict was properly denied in a case involving robbery and capital murder because defendant shot the victim while he slept with the intent of taking some of his belongings. Therefore, evidence presented to the jury showed that defendant employed or threatened to immediately employ physical force upon the victim with the purpose of committing a felony or misdemeanor theft. Terry v. State, 371 Ark. 50, 263 S.W.3d 528 (2007).

Sentence.

Robbery in Arkansas qualifies as a crime of violence under U.S. Sentencing Guidelines Manual § 4B1.2(a)(1), and attempted robbery qualifies under application note 1 to § 4B1.2. United States v. Sawyer, 588 F.3d 548 (8th Cir. 2009).

Where defendant pled guilty to armed bank robbery and had a prior state conviction for attempted robbery, the career offender provision of U.S. Sentencing Guidelines Manual § 4B1.1 was properly applied in calculating defendant's advisory Guidelines sentencing range because robbery in Arkansas qualified as a crime of violence under U.S. Sentencing Guidelines Manual § 4B1.2(a)(1), and attempted robbery qualified under § 4B1.2, application n. 1. United States v. Sawyer, 588 F.3d 548 (8th Cir. 2009).

Sufficiency of Evidence.

Court rejected defendant's argument that the evidence was insufficient to support his conviction of felony robbery under subsection (a) of this section because the state failed to prove that he used physical force to take the victim's purse where the state presented no evidence of a struggle or fight, of more force than necessary to pull the purse from the victim's arm, or of his touching any part of the victim's body. Because the victim testified that defendant snatched her purse from her, causing pain and bruises to her hand and right arm, the jury could have inferred from this evidence that injury was done, that force was used in taking the purse, and that bodily impact occurred sufficient to meet the statutory requirement of physical force. Banks v. State, 2009 Ark. App. 633, — S.W.3d — (2009).

As the victim exited her truck, a man grabbed her by her neck, put a gun to her head, and asked for her keys; she was forced into her residence and heard a shotgun fire as the man drove away. The police spotted the truck traveling at a high rate of speed apparently in flight from the scene of the crime and defendant's fingerprint was recovered from the doors; the evidence was not sufficient to sustain defendant's conviction for aggravated robbery, theft of property, and criminal mischief because there was no way to determine when defendant touched the truck. Turner v. State, 103 Ark. App. 248, 288 S.W.3d 669 (2008), review denied, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 514 (Jan. 22, 2009).

Evidence was sufficient to support defendant's conviction for robbery in violation of this section because he beat and kicked the victim, took his cell phone and wallet, asked for additional money, threatened to shoot him, and ran away; the probable consequence of those actions was that the victim would be deprived of his property, and even though defendant asserted that his motive was only "belittlement" and physical injury, the jury could have inferred from the events in the case that the statutory intent to commit a theft was satisfied. Sims v. State, 2010 Ark. App. 133, — S.W.3d — (2010).

Cited: Whitt v. State, 365 Ark. 580, 232 S.W.3d 459 (2006); Boldin v. State, 373 Ark. 295, 283 S.W.3d 565 (2008); Lacy v. State, 2010 Ark. 388, — S.W.3d — (2010); Ramsey v. State, 2010 Ark. App. 836, — S.W.3d — (2010).

5-12-103. Aggravated robbery.

CASE NOTES

Analysis

Accomplice.
Elements.
Evidence.
Lesser Included Offense.
Ownership.
Representation of Deadly Weapon.

Accomplice.

Trial court did not err in denying defendant's motion for directed verdict as there was sufficient evidence to support defendant's conviction of the underlying felony, aggravated robbery, and capital-murder, after eliminating the accomplice testimony; other corroborating evidence demonstrated that defendant had the purpose of committing theft with the use of physical force, was armed with a deadly weapon, and caused the death of the victim and, further, a doctor testified that the victim died from a gunshot wound. Gardner v. State, 364 Ark. 506, 221 S.W.3d 339 (2006).

Sufficient evidence supported defendant's convictions as an accomplice to theft of property and aggravated robbery, pursuant to this section, because defendant was present during the crime, the state established a substantial association between defendant and codefendant, and, based on those linking facts, it was reasonable for the jury to conclude that defendant assisted her codefendant by finding the victim, setting up a meeting, leading the victim to a remote location, assuring the victim would have a substantial amount of cash, moving to the backseat of the car during the robbery, and by encouraging the victim to give codefendant the cash. Ramsey v. State, 2010 Ark. App. 836, — S.W.3d — (2010).

Elements.

Evidence was sufficient to prove the theft element of aggravated robbery; evidence showed that defendant used physical force to at least temporarily deprive victim of her car, which was sufficient proof. Winston v. State, 368 Ark. 105, 243 S.W.3d 304 (2006).

In defendant's attempted capital murder case, the state presented substantial evidence of defendant's intent to commit theft because there was the victim's testimony, in which she stated that defendant told her that he was going to rob her, there was the fact that two twenty-dollar bills and some quarters were missing from the store after the attack, and there was also defendant's own videotaped statement in which he admitted to taking money from the cash register. Goodwin v. State, 373 Ark. 53, 281 S.W.3d 258 (2008).

Defendant was not required to point a gun at each of the several victims to a home invasion robbery in order to have committed aggravated robbery against each of them in violation of subdivisions (a)(1)-(3) of this section. His holding a gun to the heads of two of the victims was sufficient to instill fear in the remaining victims. Morris v. State, 2011 Ark. App. 12, — S.W.3d — (2011).

Evidence.

On appeal from convictions for two counts of aggravated robbery, pursuant to subdivision (a)(1) of this section, one count of battery, and a firearm enhancement, defendant's challenge to the sufficiency of the evidence was unsuccessful because the state presented sufficient proof of defendant's identity as one of two armed men who stole cough medicine from a pharmacy, and the state also presented sufficient evidence to establish his liability as an accomplice for all criminal acts in furtherance of that goal. Brown v. State, 2009 Ark. App. 826, — S.W.3d — (2009).

Trial court did not err by denying defendant's motion for a directed verdict on his capital murder conviction because the evidence was sufficient to support defendant's conviction of the underlying felony, aggravated robbery, even after eliminating the testimony of one of defendant's accomplices. Evidence showed that: (1) defendant had the purpose of committing a theft with the use of physical force, as he and three other individuals went to a witness's house to acquire ammunition for their firearm; (2) the fourth individual testified that defendant and three men arrived at his trailer where defendant displayed a gun, and that he provided

ammunition for the gun; (3) a second witness, one of the three men who accompanied defendant, testified that he heard two gunshots fired after the two other men left the victim's apartment after the struggle between defendant and the victim ensued; and (4) the chief medical examiner testified that the victim died from a gunshot wound. Gardner v. State, 362 Ark. 413, 208 S.W.3d 774 (2006).

Where defendant was convicted of aggravated robbery and capital murder for killing a grocery store owner, the trial court did not err in denying defendant's motion for a directed verdict because the jury did not have to resort to speculation and conjecture as it apparently believed testimony from defendant's four friends concerning his actions and admissions on the night the crimes were committed and the next day when he fled. Whitt v. State, 365 Ark. 580, 232 S.W.3d 459 (2006).

There was sufficient evidence to support a conviction where evidence showed that two murders were committed during a robbery, defendant made inculpatory statements regarding the robbery, the victims had a large amount of cash, and defendant made calls to their phone on the day of the shooting. Harris v. State, 366 Ark. 190, 234 S.W.3d 273 (2006).

Evidence was sufficient to sustain defendant's convictions for aggravated robbery, residential burglary, and felony theft of property because an accomplice testified that he and defendant had a purpose of committing theft when they went to the victim's apartment, defendant used physical force upon the victim, defendant was armed with a deadly weapon, and a witness testified that she observed defendant carry out a television and load it into the car. Navarro v. State, 371 Ark. 179, 264 S.W.3d 530 (2007).

Defendant's convictions for aggravated robbery and theft were proper because defendant employed physical force upon the victim, admitted to stabbing the victim, and was armed with a deadly weapon. Further, the fact that defendant pawned the victim's tools and tried to sell other stolen items established a purpose to commit theft. Young v. State, 371 Ark. 393, 266 S.W.3d 744 (2007).

Substantial evidence indicated that defendant was armed with a deadly weapon for the purpose of committing theft, and defendant was part of a plan to take the victim's money; there did not have to be an actual transfer of property to take place for the offense of aggravated robbery to be complete, and defendant and another clearly followed through with the plan, whether or not they verbally acknowledged their agreement at the time the plan was conceived. Moore v. State, 372 Ark. 579, 279 S.W.3d 69 (2008).

Denial of defendant's motion for directed verdict on capital murder and aggravated murder charges under this section and §§ 5-10-101 and 5-12-102, was proper as the evidence showed that defendant held a pistol, a deadly weapon, and that he committed theft while armed with the pistol; the evidence also showed that he caused the death of the victim in immediate flight from the aggravated robbery under circumstances manifesting extreme indifference to the value of human life. Flowers v. State, 373 Ark. 119, 282 S.W.3d 790 (2008).

Sufficient evidence supported defendant's convictions for first-degree murder under § 5-10-102(a), and aggravated robbery under subsection (a) of this section, including the testimony of several witnesses who saw defendant with the victim's car, as well as the testimony of two witnesses who saw defendant drive the car under the bridge where the victim's body was found and return without the victim in the car. Defendant told one witness that he intended to kill the victim and steal his car, and after the murder he boasted about shooting the victim and showed two witnesses the bullet he found in the victim's car; the bullet he was carrying was consistent with the suspected murder weapon, and the victim's blood was found on his clothing. Boldin v. State, 373 Ark. 295, 283 S.W.3d 565 (2008).

Substantial evidence supported the jury's verdict that defendant committed aggravated robbery in that he robbed the victim of the contents of the cigar box and inflicted serious injury; the cigar box was nearly empty when found and the slip of paper the victim kept in the box was found in defendant's property taken when he was booked. Sales v. State, 374 Ark. 222, 289 S.W.3d 423 (2008), cert. denied, Sales v. Arkansas, — U.S. —, 129 S. Ct. 2000, 173 L. Ed. 2d 1098 (2009).

Defendant's convictions for two counts of aggravated robbery were proper under

§ 5-12-102(a) and subsection (a) of this section because a neighbor verified that one of the intruders had a gun; the victim told officers that the intruders hid their guns in the closet, where two guns were found; and both intruders were charged in the same instrument, implicating accomplice liability. That provided substantial evidence to support the finding that the intruders at minimum represented by word or conduct that they were armed as a threat in order to commit the theft. Hinton v. State, 2010 Ark. App. 341, — S.W.3d — (2010), rehearing denied, — Ark. App. —, — S.W.3d —, 2010 Ark. App. LEXIS 516 (June 2, 2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 399 (Aug. 6, 2010).

There was substantial evidence to support the jury's verdict that defendant committed aggravated robbery and capital murder. The state offered proof of defendant's own statements to police investigators that he hit the victim over the head with the poker and then forced him to open the safe; defendant admitted to stabbing the victim in the chest with the poker and slitting his throat with a knife. Such statements all substantiated that the robbery and the murder took place very close in time, which was ample circumstantial proof that defendant intended to commit a robbery. Lacy v. State, 2010 Ark. 388, — S.W.3d — (2010), cert. denied, Lacy v. Arkansas, — U.S. —, — S. Ct. —, 179 L. Ed. 2d 942 (2011).

While there was no testimony that anyone saw defendant at the scene or with a gun, evidence was sufficient to convict defendant of aggravated robbery, under this section, and first-degree murder, under § 5-10-102(a)(1), as it showed defendant had access to a gun, the car defendant was driving that night was at the scene, and the victim's condition suggested a robbery. Bates v. State, 2010 Ark. App. 417, — S.W.3d — (2010).

Defendant's aggravated robbery conviction pursuant to this section was proper because a car theft victim's testimony that the victim got out of the victim's car when defendant indicated that defendant had a gun was sufficient to substantiate the conviction. Sartin v. State, 2010 Ark. App. 494, — S.W.3d — (2010).

Evidence was sufficient to support the jury's finding that defendant committed aggravated robbery where defendant was armed with a knife, used it to threaten to kill the victim, and then stole money from her and a medical clinic. Sweet v. State, 2011 Ark. 20, — S.W.3d — (2011).

Defendant's convictions for aggravated residential burglary in violation of § 5-39-204(a) and aggravated robbery in violation of subsection (a) of this section were appropriate because the state provided sufficient evidence to corroborate his accomplices' testimony; even eliminating the accomplice testimony, the remaining evidence presented independently established the crimes and tended to connect defendant with their commission. In part, witnesses testified about defendant being with the accomplices on the day of the crimes and the state also presented a witness's testimony that defendant had sold him the three shotguns that were identified as being the ones stolen from the victim. Tucker v. State, 2011 Ark. 144, — S.W.3d — (2011).

Evidence that defendant demanded money from a store employee while brandishing a firearm supported his conviction for aggravated robbery. Lambert v. State, 2011 Ark. App. 258, — S.W.3d — (2011).

Lesser Included Offense.

Prohibition against double jeopardy was not violated when defendant was convicted of first-degree battery and aggravated robbery because the elements of the offenses were not the same, and aggravated battery was not a lesser included offense of aggravated robbery. Clark v. State, 373 Ark. 161, 282 S.W.3d 801 (2008).

First-degree battery is not a lesser included offense of aggravated robbery as it is not established by proof of the same or less than all of the elements required to prove aggravated robbery. First-degree battery requires proof of the use of a firearm, whereas aggravated robbery does not; aggravated robbery requires proof of a robbery, whereas first-degree battery does not. Clark v. State, 373 Ark. 161, 282 S.W.3d 801 (2008).

Trial court did not err in refusing to instruct the jury on aggravated assault during defendant's trial for aggravated robbery because aggravated assault, in violation of § 5-13-204(a)(1) and (2), was not a lesser-included offense of aggravated robbery pursuant to § 5-1-110(b)(1) as the two offenses required different ele-

ments of proof; aggravated assault required proof of circumstances manifesting extreme indifference to the value of human life, whereas aggravated robbery did not require such proof. Matthews v. State, 2009 Ark. 321, 319 S.W.3d 266 (2009).

In an aggravated robbery case, where there was no rational basis for a trial judge to instruct the jury on ordinary robbery, there was no error in the trial judge's failure to do so. Sweet v. State, 2011 Ark. 20, — S.W.3d — (2011).

Ownership.

Evidence was sufficient to support defendant's conviction of aggravated robbery under § 5-36-102 where defendant pointed a pistol at the victim and demanded that the victim repay a two dollar debt because the intent to collect a debt at gunpoint did not negate the necessary intent to steal under subdivision (a)(1) of this section. Because defendant could not trace his ownership to the specific bills in the victim's possession, the victim, and not defendant, was the owner of the money in his possession, and it was theft to take it from him. Heard v. State, 2009 Ark. 546, — S.W.3d — (2009).

Representation of Deadly Weapon.

Testimony from a victim and a witness in a mall parking lot purse snatching that defendant verbally represented that he had a gun and would shoot was sufficient to convict defendant for aggravated robbery under subsection (a) of this section regardless of whether he did in fact have a weapon. Nelson v. State, 2010 Ark. App. 69, — S.W.3d — (2010).

CHAPTER 13

ASSAULT AND BATTERY

SUBCHAPTER.

Subchapter 2 — Offenses Generally

SECTION.

5-13-201. Battery in the first degree.

(a) A person commits battery in the first degree if:

(1) With the purpose of causing serious physical injury to another person, the person causes serious physical injury to any person by means of a deadly weapon;

(2) With the purpose of seriously and permanently disfiguring another person or of destroying, amputating, or permanently disabling a member or organ of that other person's body, the person causes such an injury to any person;

(3) The person causes serious physical injury to another person under circumstances manifesting extreme indifference to the value of human life;

(4) Acting alone or with one (1) or more other persons:

(A) The person commits or attempts to commit a felony; and

(B) In the course of and in furtherance of the felony or in immediate flight from the felony:

(i) The person or an accomplice causes serious physical injury to any person under circumstances manifesting extreme indifference to the value of human life; or

(ii) Another person who is resisting the felony or flight causes serious physical injury to any person;

(5) With the purpose of causing serious physical injury to an unborn child or to a woman who is pregnant with an unborn child, the person causes serious physical injury to the unborn child;

(6) The person knowingly causes physical injury to a pregnant woman in the commission of a felony or a Class A misdemeanor, and in so doing, causes serious physical injury to the pregnant woman's unborn child, and the unborn child is subsequently born alive;

(7) The person knowingly, without legal justification, causes serious physical injury to a person he or she knows to be twelve (12) years of age or younger;

(8) With the purpose of causing physical injury to another person, the person causes physical injury to any person by means of a firearm; or

(9) The person knowingly causes serious physical injury to any person four (4) years of age or younger under circumstances manifesting extreme indifference to the value of human life.

(b) It is an affirmative defense in any prosecution under subdivision (a)(4) of this section in which the defendant was not the only participant that the defendant:

(1) Did not commit the battery or in any way solicit, command, induce, procure, counsel, or aid the battery's commission;

(2) Was not armed with a deadly weapon;

(3) Reasonably believed that no other participant was armed with a deadly weapon; and

(4) Reasonably believed that no other participant intended to engage in conduct that could result in serious physical injury.

(c)(1) Except as provided in subdivisions (c)(2) and (3) of this section, battery in the first degree is a Class B felony.

(2) Battery in the first degree is a Class Y felony under the circumstances described in subdivision (a)(9) of this section.

(3) Battery in the first degree is a Class Y felony if the injured person is a law enforcement officer acting in the line of duty.

History. Acts 1975, No. 280, § 1601; A.S.A. 1947, § 41-1601; Acts 1987, No. 482, § 1; 1995, No. 360, § 1; 1995, No. 1305, § 1; 2005, No. 1994, § 474; 2007, No. 622, § 1; No. 709, § 2; No. 827, § 26.

A.C.R.C. Notes. Acts 2007, No. 709, § 1, provided:

"This act shall be known and may be cited as 'Corporal Scott Baxter's Law'."

Amendments. The 2007 amendment by No. 622 added (a)(9) and made related changes; redesignated former (c) as present (c)(1); substituted "Except as provided in subdivision (c)(2) of this section, battery" for "Battery" in (c)(1); and added (c)(2).

The 2007 amendment by No. 709 redesignated former (c) as present (c)(1);

substituted "Except as provided in subdivision (c)(2) of this section, battery" for "Battery" in (c)(1); and added (c)(3).

The 2007 amendment by No. 827 substituted "knowingly" for "intentionally or knowingly" in (a)(7).

CASE NOTES

Analysis

Defense or Justification.
Elements.
Evidence.
Information.
Instructions.
Lesser Included Offenses.
Multiple Convictions.
Physical Injury.

Defense or Justification.

Substantial evidence negated defendant's claim of self-defense under § 5-2-607(a)(2) in his trial for first degree battery under this section because there was no evidence that the victim was armed when defendant shot him and, although defendant testified that the victim attacked him earlier in the day, there was no evidence of an injury to defendant and defendant testified that he was not afraid of the victim; although defendant testified at trial that he was afraid that the victim was going to attack him at the time that he shot him, defendant never made a similar claim in his statement to the police after the incident. Metcalf v. State, 2011 Ark. App. 55, — S.W.3d — (2011), rehearing denied, — Ark. App. —, — S.W.3d —, 2011 Ark. App. LEXIS 147 (Feb. 23, 2011).

Elements.

There was no violation of defendant's rights under § 5-1-110(a)(4) because when comparing the elements of the two offenses it was evident that the conduct of committing a terroristic act under § 5-13-310 was not a specific instance of conduct constituting first-degree battery under this section. Warren v. State, 103 Ark. App. 124, 286 S.W.3d 768 (2008).

Evidence.

Defendant's convictions were supported by substantial evidence where it was shown that (1) shortly after the incident, defendant had a blood-alcohol level of .23 percent, (2) defendant was driving the car that hit two women and narrowly missed a third, (3) just before the impact, defendant was witnessed to speed up and actually swerve the vehicle toward the women's path, and (4) defendant drove away after the impact. Estacuy v. State, 94 Ark. App. 183, 228 S.W.3d 567 (2006).

Evidence was sufficient to sustain a conviction for first degree battery because defendant drove a fully loaded commercial vehicle weighing over 82,000 pounds while under the influence of methamphetamine, and the entire vehicle, with the exception of the right rear axle, crossed into the oncoming-traffic lane, striking a motor home, and ultimately driving through it. Defendant never attempted to brake prior to the accident or to return to the proper lane of traffic. Hoyle v. State, 371 Ark. 495, 268 S.W.3d 313 (2007), rehearing denied, — Ark. —, — S.W.3d —, 2008 Ark. LEXIS 12 (Jan. 10, 2008).

Evidence was sufficient to support a conviction for first-degree battery under subdivision (a)(8) of this section where defendant purposely fired three times at an occupied truck on a highway; a passenger was struck and seriously injured. There was a presumption that defendant intended the natural and probable consequences of his actions. Spight v. State, 101 Ark. App. 400, 278 S.W.3d 599 (2008).

Evidence that included defendant's firing a shot in the direction of a victim's truck, testimony of two individuals that on separate occasions defendant told them he had shot a man, and defendant's evading the responding police was sufficient to convict defendant of first-degree battery in violation of subdivision (a)(3) of this section. Warren v. State, 103 Ark. App. 124, 286 S.W.3d 768 (2008).

When defendant's infant son was taken to the emergency room, the treating physician found that his broken femur was indicative of child abuse; the infant had fourteen broken rib bones in various stages of healing, and defendant admitted that he would squeeze his son when he got mad. Defendant was convicted of three counts of battery in the second degree in violation of § 5-26-304 and one count of battery in the first degree under subdivi-

sion (a)(7) of this section; whether defendant committed serious physical injury under circumstances manifesting extreme indifference to the value of human life was not an issue in the case, because he was not charged under subdivision (a)(3) of this section. Davis v. State, 2009 Ark. App. 573, — S.W.3d — (2009).

Sufficient evidence supported the conclusion that a defendant intended to cause serious physical harm to a victim: a witness testified that the witness gave defendant a gun, other witnesses testified that defendant shot the victim with that gun, the victim was shot in the arm and hip, which required surgery, and the victim continued to suffer with pain and impairment as a result of the injuries. Hawkins v. State, 2009 Ark. App. 675, — S.W.3d — (2009).

Where the state's three witnesses testified that defendant threatened to kill the victim during an argument over money, the state proved by a preponderance of the evidence that defendant committed second-degree terroristic threatening under this section. The trial court was free to reject defendant's testimony that he never threatened the victim and was not a violent person; the trial court did not err by revoking his suspended sentence. Whitney v. State, 2009 Ark. App. 726, — S.W.3d — (2009).

Defendant's conviction of first-degree battery based upon defendant's participation as an accomplice was proper because there was sufficient evidence, including certain statements made by defendant, in addition to accomplice testimony, to support the conviction; defendant's own statement showed that when defendant left a store where a codefendant bought camouflage ski masks defendant knew, at a minimum, that the codefendant was carrying a gun and planning to harm an individual. Porter v. State, 2010 Ark. App. 657, — S.W.3d — (2010).

Substantial evidence supported defendant's conviction for first-degree battery pursuant to subdivision (a)(3) of this section because the evidence supported the jury's finding that defendant caused serious physical injury to the victim, who was the boyfriend of defendant's daughter, under circumstances manifesting extreme indifference to the value of human life; defendant shot a gun through a door when he knew the victim was directly on the other side of it, and both the victim and the daughter told an investigator that they thought defendant intended to kill the victim and would have done so if the daughter had not called 911. Reed v. State, 2011 Ark. App. 352, — S.W.3d — (2011).

Information.

State's amendment of an information did not violate § 16-85-407 because the amendment did not constitute a severance of offenses under Ark. R. Crim. P. 22.1(c), and the evidence would have been introduced in any case as part of the events leading up to the shooting whether it was included in the charging instrument or not; the only offense charged in the case was first-degree battery under subdivision (a)(3) of this rule, and the amendment did not change the nature or degree of the crime but merely clarified the manner in which the offense was committed. Reed v. State, 2011 Ark. App. 352, — S.W.3d — (2011).

Instructions.

Circuit court did not abuse its discretion in denying defendant's second-degree battery instruction because the offense charged was first-degree battery pursuant to subdivision (a)(3) of this section, and the jury was not required to find that defendant employed a firearm in order to convict him of that offense, nor was the jury required to apply the firearm enhancement if it convicted defendant of first-degree battery; the firearm enhancement was not an element of the first-degree-battery offense but was an additional sentence authorized by statute if defendant was convicted of first-degree battery, and the jury determined that defendant employed a firearm during commission of that offense. Reed v. State, 2011 Ark. App. 352, — S.W.3d — (2011).

Lesser Included Offenses.

In a first-degree battery case, a trial court did not err by refusing to give an instruction on second-degree battery because it was not a lesser included offense; both alternatives given in the proffered instruction required an additional element, serious physical injury, that was not required in the first-degree battery instruction that was given, which only required physical injury when the injury was caused by a firearm. Further, the proffered instruction was not a lesser in-

cluded offense because the offense was not an attempt offense, and the proffered instruction did not differ from the offense charged only in the respect that a less serious injury to the same person sufficed to establish the offense's commission. Spight v. State, 101 Ark. App. 400, 278 S.W.3d 599 (2008).

Multiple Convictions.

There was no violation of defendant's rights under § 5-1-110(a)(4) because when comparing the elements of the two offenses it was evident that the conduct of committing a terroristic act under § 5-13-310 was not a specific instance of conduct constituting first-degree battery under this section. Warren v. State, 103 Ark. App. 124, 286 S.W.3d 768 (2008).

Physical Injury.

Evidence that defendant participated in kicking a 14-year-old victim while he was lying on the ground after having his two front teeth knocked out by one of defendant's fellow assailants, was sufficient to support defendant's conviction for first-degree battery in violation of subdivision (a)(3) of this section. Williamson v. State, 2011 Ark. App. 73, — S.W.3d — (2011).

Cited: Misenheimer v. State, 100 Ark. App. 189, 265 S.W.3d 764 (2007).

5-13-202. Battery in the second degree.

(a) A person commits battery in the second degree if:

(1) With the purpose of causing physical injury to another person, the person causes serious physical injury to any person;

(2) With the purpose of causing physical injury to another person, the person causes physical injury to any person by means of a deadly weapon other than a firearm;

(3) The person recklessly causes serious physical injury to another person by means of a deadly weapon; or

(4) The person knowingly, without legal justification, causes physical injury to or incapacitates a person he or she knows to be:

(A)(i) A law enforcement officer, firefighter, code enforcement officer, or employee of a correctional facility while the law enforcement officer, firefighter, code enforcement officer, or employee of a correctional facility is acting in the line of duty.

(ii) As used in this subdivision (a)(4)(A):

(a)(1) "Code enforcement officer" means an individual charged with the duty of enforcing a municipal code, municipal ordinance, or municipal regulation as defined by a municipal code, municipal ordinance, or municipal regulation.

(2) "Code enforcement officer" includes a municipal animal control officer;

(b) "Employee of a correctional facility" includes a person working under a professional services contract with the Department of Correction, the Department of Community Correction, or the Division of Youth Services of the Department of Human Services; and

(B) A teacher or other school employee while acting in the course of employment;

(C) An individual sixty (60) years of age or older or twelve (12) years of age or younger;

(D) An officer or employee of the state while the officer or employee of the state is acting in the performance of his or her lawful duty;

(E) While performing medical treatment or emergency medical services or while in the course of other employment relating to his or her medical training:

(i) A physician;

(ii) A person licensed as emergency medical services personnel, as defined in § 20-13-202;

(iii) A licensed or certified health care professional; or

(iv) Any other health care provider; or

(F) An individual who is incompetent, as defined in § 5-25-101.

(b) Battery in the second degree is a Class D felony.

History. Acts 1975, No. 280, § 1602; 1981, No. 877, § 1; 1983, No. 12, § 1; A.S.A. 1947, § 41-1602; Acts 1995, No. 1173, § 1; 1995, No. 1305, § 2; 1995, No. 1338, § 1; 1997, No. 207, § 1; 1997, No. 878, § 1; 1999, No. 389, § 1; 2003, No. 66, § 1; 2007, No. 827, § 27; 2009, No. 344, § 1; 2009, No. 689, § 1; 2011, No. 1120, § 6; 2011, No. 1168, § 1.

Amendments. The 2007 amendment substituted "knowingly" for "intentionally or knowingly" in (4).

The 2009 amendment by No. 344, in (a)(4)(A), inserted "code enforcement officer" in (a)(4)(A)(i), inserted (a)(4)(A)(ii)(*b*) and redesignated the remaining text of (a)(4)(A)(ii) accordingly, and made related changes.

The 2009 amendment by No. 689 rewrote (a)(4)(E)(ii).

The 2011 amendment by No. 1120 inserted the first instance of "code enforcement officer" in (a)(4)(A)(i).

The 2011 amendment by No. 1168 inserted "or incapacitates" in (a)(4).

CASE NOTES

Analysis

In General.
Defense or Justification.
Evidence.
Law Enforcement Officer.
Lesser Included Offenses.
Physical Injury.

In General.

Collateral estoppel did not preclude the trial court from making a determination under 11 U.S.C.S. § 523(a)(6) on the issues of willfulness and maliciousness. It was not necessary to a criminal conviction for second-degree battery under this section that the debtor's actions be willful and malicious; furthermore, the fact that defendant stipulated to liability in a civil suit did not satisfy the "actually litigated" requirement. Hidy v. Bullard Iin re Bullard), — B.R. —, 2011 Bankr. LEXIS 274 (Bankr. E.D. Ark. Jan. 21, 2011), aff'd, Hidy v. Bullard (In re Bullard), — B.R. —, 2011 Bankr. LEXIS 2151 (B.A.P. 8th Cir. June 14, 2011).

Defense or Justification.

Because second-degree battery has as one of its elements the infliction of serious physical injury, it is a "felony involving force or violence"; thus, in a second-degree murder case, the trial court erred by failing to give a jury instruction for justification that had both second-degree battery and unlawful deadly physical force alternatives since both were warranted by evidence that defendant was confronted by three men in an attack before he stabbed one of them in the heart with a pocket knife. Hamilton v. State, 97 Ark. App. 172, 245 S.W.3d 710 (2006).

Defendant's conviction for battery in the second degree was proper because he did not have a justification defense under § 5-2-608(a) since defendant's version of the events was unbelievable; any reasonable person would have realized that the victim was acting on behalf of a repossession agency and therefore, defendant could not have been acting on a reasonable belief that he was preventing a criminal trespass. Further, there was no evi-

dence to indicate that the victim used force against defendant or threatened him with force. Washington v. State, 2010 Ark. App. 339, — S.W.3d — (2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 379 (June 24, 2010).

Evidence.

Defendant's conviction for battery in the second degree was appropriate under §§ 5-13-202(a)(4)(C) and 5-2-202(2) because the evidence was clear that defendant intended to restrain the victim. The victim, defendant's mother-in-law, testified that defendant grabbed her, threw her into a chair, and pushed her down anytime the victim had tried to stand up. LaFort v. State, 98 Ark. App. 202, 254 S.W.3d 27 (2007).

Teacher's testimony alone was sufficient evidence of physical injury to support defendant juvenile's adjudication for second degree in violation of this section for striking the teacher in the arm because the teacher testified that after appellant hit her, the pain she suffered in her arm was of a sufficient nature to cause her to seek medical treatment, and she also testified that her arm was "very sore" for at least a week; while medical treatment is not required in order to establish a physical injury, the fact the pain was of a sufficient nature to cause the victim to seek medical care constitutes evidence that she experienced "substantial pain." M. T. v. State, 2009 Ark. App. 761, — S.W.3d — (2009).

Substantial evidence supported defendant's conviction for second-degree battery against a police officer in violation of subdivision (a)(4)(A)(i) of this section because a police officer testified that she injured her hand when defendant tackled her, and although the officer surmised that the injury could have occurred during her pursuit of defendant, it was for the fact-finder to weigh the evidence and to determine when the injury occurred; the trier of fact could find that the officer injured her hand during the altercations with defendant and not during the foot chase. Lee v. State, 2010 Ark. App. 15, — S.W.3d — (2010).

Defendant's conviction for battery in the second degree in violation of subdivision (a)(2) of this section was appropriate because there was substantial evidence presented to support the determination that, with the purpose of causing physical injury to the victim, defendant caused physical injury to the victim by means of a deadly weapon other than a firearm, specifically, a metal steering wheel theft-protection device. Washington v. State, 2010 Ark. App. 339, — S.W.3d — (2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 379 (June 24, 2010).

Evidence that defendant struck the victim in head with a chain-saw blade with the purpose of causing physical injury, supported a finding of second-degree battery. Dooly v. State, 2010 Ark. App. 591, — S.W.3d — (2010).

Once jury concluded that defendant's account of events was not truthful and that a hot instrument, not hot water, was what caused the burns to defendant's daughter, the evidence was consisted with defendant's conviction for second-degree battery. McKnight v. State, 2010 Ark. App. 598, — S.W.3d — (2010).

Law Enforcement Officer.

Trial court did not err by refusing to instruct a jury on third-degree battery as a lesser included offense of second-degree battery where there was no evidence tending to disprove that the victim was an employee of a correctional facility; there was testimony that referred to the victim as a "detention officer" and "jailer." Davis v. State, 97 Ark. App. 6, 242 S.W.3d 630 (2006).

Lesser Included Offenses.

In a first-degree battery case, a trial court did not err by refusing to give an instruction on second-degree battery because it was not a lesser included offense; both alternatives given in the proffered instruction required an additional element, serious physical injury, that was not required in the first-degree battery instruction that was given, which only required physical injury when the injury was caused by a firearm. Further, the proffered instruction was not a lesser included offense because the offense was not an attempt offense, and the proffered instruction did not differ from the offense charged only in the respect that a less serious injury to the same person sufficed to establish the offense's commission. Spight v. State, 101 Ark. App. 400, 278 S.W.3d 599 (2008).

Physical Injury.

Trial court did not err in refusing to direct the verdicts where defendant took

actions to conceal the harm to the child, and failed to take action to secure appropriate care for the child; the jury could conclude that defendant rubbing a substance known to cause skin irritation on the face of a toddler where Superglue had already adhered would cause, at the very least, the impairment of physical condition or a visible mark associated with the physical trauma. Price v. State, 2009 Ark. App. 664, — S.W.3d — (2009).

Cited: Hayes v. State, 2009 Ark. App. 663, — S.W.3d — (2009).

5-13-203. Battery in the third degree.

CASE NOTES

Analysis

Evidence.
Instructions.
Lesser Included Offenses.

Evidence.

Evidence was sufficient to convict defendant of battery in the third degree under subdivision (a)(1) of this section because defendant admitted to purposely hitting the victim, the victim and two witnesses testified that the victim had an injury to the forehead following the incident, and an officer testified as to the victim's injury. Beare v. State, 2010 Ark. App. 544, — S.W.3d — (2010).

Instructions.

Following a vehicle collision, defendant was charged with driving while intoxicated as a second offense, negligent homicide, first-degree battery, and aggravated assault. Defendant invited any error committed by the trial court in giving his requested instruction on third-degree battery that also included the element of physical injury caused by means of a deadly weapon under subdivision (a)(3) of this section. Hayes v. State, 2009 Ark. App. 663, — S.W.3d — (2009).

Court of appeals refused to consider defendant's argument that the trial court abused its discretion in denying his proffered third-degree battery instruction because defendant did not make the argument to the trial court; defendant made no argument regarding the firearm or the mental state required for the proffer of his third-degree-battery instruction, and the trial court did not consider the third-degree instruction as it related to evidence other than the evidence surrounding a pool cue. Reed v. State, 2011 Ark. App. 352, — S.W.3d — (2011).

Lesser Included Offenses.

Trial court did not err by refusing to instruct a jury on third-degree battery as a lesser included offense of second-degree battery, in violation of § 5-13-202(a)(4)(A)(i), where there was no evidence tending to disprove that the victim was an employee of a correctional facility; there was testimony that referred to the victim as a "detention officer" and "jailer." Davis v. State, 97 Ark. App. 6, 242 S.W.3d 630 (2006).

5-13-204. Aggravated assault.

(a) A person commits aggravated assault if, under circumstances manifesting extreme indifference to the value of human life, he or she purposely:

(1) Engages in conduct that creates a substantial danger of death or serious physical injury to another person;

(2) Displays a firearm in such a manner that creates a substantial danger of death or serious physical injury to another person; or

(3) Impedes or prevents the respiration of another person or the circulation of another person's blood by applying pressure on the throat or neck or by blocking the nose or mouth of the other person.

(b) Aggravated assault is a Class D felony.

(c) The provisions of this section do not apply to:

(1) A law enforcement officer acting within the scope of his or her duty; or

(2) A person acting in self-defense or the defense of a third party.

History. Acts 1975, No. 280, § 1604; A.S.A. 1947, § 41-1604; Acts 2003, No. 1113, § 1; 2009, No. 332, § 1.

Amendments. The 2009 amendment inserted (a)(3) and made related and minor stylistic changes.

CASE NOTES

Analysis

Defense or Justification.
Double Jeopardy.
Evidence.
Intent.
Lesser Included Offenses.

Defense or Justification.

Because defendant presented evidence arguably supporting self defense or a justification defense to a charge of aggravated assault under Arkansas law, the government had to negate that defense by a preponderance of the evidence for an enhancement for using the firearm in connection with another felony offense under U.S. Sentencing Guidelines Manual § 2K2.1(b)(5) [now (b)(6)] (2005), to apply because whether circumstances negated defendant's excuse or justification was an element of the offense under § 5-1-102(5)(C), which had to be proved by the state under § 5-1-111(a)(1), and the definition of aggravated assault expressly excluded any person acting in self-defense or the defense of a third party under subdivision (c)(2) of this section. United States v. Raglin, 500 F.3d 675 (8th Cir. 2007).

Preponderance of the evidence supported the district court's finding that defendant's use of deadly physical force under § 5-2-601(2) and (6)(B), which occurred when he pointed a loaded pistol at an undercover officer, was not justified or in self defense, and thus, he was guilty of the felony of aggravated assault under Arkansas law, and the four-level enhancement under U.S. Sentencing Guidelines Manual § 2K2.1(b)(5) [now (b)(6)] was properly imposed because (1) defendant did not act in self-defense within the meaning of subdivision (c)(2) of this section as he used deadly force against men who had obeyed his command to leave his property and who were loitering on the public sidewalk in front of his house as there was no evidence they were imminently endangering defendant's life under § 5-2-607(a); (2) under § 5-2-607(b)(1), defendant could not use deadly force after he had retreated safely to his house and returned later, unprovoked, to threaten the men; (3) defendant's conduct was not justified as permissible defense of his property within the purview of § 5-2-608 because use of deadly physical force was not authorized by § 5-2-607, and he had no reason to believe that the men who had quietly obeyed a command to leave his property would come back to commit arson or burglary; and (4) defendant's conduct was not justified to defend his home under § 5-2-620 because the men defendant assaulted were not attempting to enter his home, so the statute did not apply. United States v. Raglin, 500 F.3d 675 (8th Cir. 2007).

Denial of defendant's motion for a brain injury examination did not deprive defendant of a basic tool for his defense as defendant was examined by a psychologist and he failed to object to the admission of the psychologist's report into evidence; defendant could not assert that failure to appoint a head-injury expert rose to the level of protection afforded by the third Wicks exception as (1) defendant was given an opportunity by the trial court to renew the motion for an appointment of the expert but he failed to do so, (2) it was not the trial court's duty to adequately prepare and present defendant's defense, and (3) defendant's argument could not be reviewed as an issue that fell within the purview of Ark. R. App. P. Crim. 10(b)(iv) because it was not a serious error requiring the trial court to intervene and issue an admonition or declare a mistrial. Springs v. State, 368 Ark. 256, 244 S.W.3d 683 (2006), cert. denied, 550 U.S. 939, 127 S. Ct. 2257, 167 L. Ed. 2d 1100 (2007).

Trial court did not err in sustaining state's objection that the terms of the civil

dispute regarding a loan and the collateral for the loan were irrelevant and in refusing to permit defendant to question the victim concerning the property that had been collateral for the loan because, even if the victim had lied regarding the terms of the loan, that would be no defense to the crimes for which he was convicted, which included kidnapping, terroristic threatening, and aggravated assault. Tarpley v. State, 97 Ark. App. 122, 245 S.W.3d 192 (Dec. 13, 2006).

Double Jeopardy.

Defendant's convictions for aggravated assault in and use of a firearm in commission of a felony in violation of § 16-90-120 did not subject defendant to double jeopardy as the § 16-90-120 conviction was used to enhance defendant's sentence. Davis v. State, 93 Ark. App. 443, 220 S.W.3d 248 (2005).

Evidence.

Evidence was sufficient to sustain defendant's conviction for aggravated assault and aggravated assault on a family member when, among other things, evidence showed that defendant drove a car in an attempt to run over the victim, the father of her child, and his girlfriend. Williams v. State, 96 Ark. App. 277, 241 S.W.3d 290 (2006).

Defendant's convictions were supported by substantial evidence where it was shown that (1) shortly after the incident, defendant had a blood-alcohol level of .23 percent, (2) defendant was driving the car that hit two women and narrowly missed a third, (3) just before the impact, defendant was witnessed to speed up and actually swerve the vehicle toward the women's path, and (4) defendant drove away after the impact. Estacuy v. State, 94 Ark. App. 183, 228 S.W.3d 567 (2006).

Offense of terroristic threatening required no more than the communication of a threat, by word or deed, with the purpose of terrorizing the victim, and the offense of aggravated assault was accomplished when defendant displayed the gun and pointed it at the victim; given the testimony that defendant kept the doorway blocked for several minutes after performing those acts and that the victim was prevented from summoning assistance during that time, the evidence was sufficient to sustain the kidnapping conviction. Tarpley v. State, 97 Ark. App. 122, 245 S.W.3d 192 (Dec. 13, 2006).

Substantial evidence supported defendant's convictions for aggravated robbery, kidnapping, aggravated assault, theft of property, unlawful discharge of a firearm from a vehicle, and fleeing because while the state did not prove that defendant actually entered a bank, it did provide substantial evidence that he was the driver of the getaway car and thus was an accomplice of the two men who committed the aggravated robbery, kidnapping, and theft of property; after an officer turned on his blue lights, defendant accelerated to a speed of 100 miles per hour and struck an SUV, causing it to flip and resulting in injuries to the driver, and that conduct sufficiently satisfied the elements of aggravated assault and fleeing. Barber v. State, 2010 Ark. App. 210, — S.W.3d — (2010).

Although there was not substantial evidence to support defendant's convictions for aggravated assault pursuant to subsection (a) of this section with respect to defendant sideswiping a victim's vehicle on an interstate, under § 5-1-110(b), the evidence would clearly sustain convictions for the lesser-included offense of first degree assault under § 5-13-205(a); the testimony established defendant acted recklessly when he approached the victim's vehicle from the rear, going very fast, and in passing the victim's vehicle on the left, defendant sideswiped the vehicle. Mance v. State, 2010 Ark. App. 472, — S.W.3d — (2010).

Evidence was sufficient to sustain an aggravated assault conviction under this section because defendant had complete control of his pit bull, and he directed the dog to attack an officer; by instructing his dog to "get" the officer, defendant intentionally engaged in conduct that put the officer at risk of being bitten by the dog. Banks v. State, 2011 Ark. App. 249, — S.W.3d — (2011).

Intent.

Sufficient evidence established defendant had the necessary purposeful intent, as defined in § 5-2-202(1), to commit aggravated assault in violation of subsection (a) of this section with respect to a vehicular incident on a local road because the victim testified defendant stopped his car, put it in reverse, and rammed into the

victim's vehicle enough times and with enough force to cause her vehicle to spin; the victim's testimony constituted substantial evidence that it was defendant's conscious object to engage in conduct that created a substantial danger of death or serious physical injury to the victim and her infant son, who was also in the car. Mance v. State, 2010 Ark. App. 472, — S.W.3d — (2010).

Lesser Included Offenses.

Trial court did not err in refusing to instruct the jury on aggravated assault during defendant's trial for aggravated robbery because aggravated assault, in violation of subdivisions (a)(1) and (2) of this section, was not a lesser-included offense of aggravated robbery pursuant to § 5-1-110(b)(1) as the two offenses required different elements of proof; aggravated assault required proof of circumstances manifesting extreme indifference to the value of human life, whereas aggravated robbery did not require such proof. Matthews v. State, 2009 Ark. 321, 319 S.W.3d 266 (2009).

5-13-205. Assault in the first degree.

(a) A person commits assault in the first degree if he or she:

(1) Recklessly engages in conduct that creates a substantial risk of death or serious physical injury to another person; or

(2) Purposely impedes or prevents the respiration of another person or the circulation of another person's blood by applying pressure on the throat or neck or by blocking the nose or mouth of the other person.

(b) Assault in the first degree is a Class A misdemeanor.

(c) It is a defense to prosecution under subdivision (a)(2) of this section if the other person consented to the impeding or prevention of his or her respiration or circulation of blood.

History. Acts 1975, No. 280, § 1605; A.S.A. 1947, § 41-1605; Acts 2009, No. 332, § 2.

Amendments. The 2009 amendment, in (a), inserted (a)(2), redesignated the remaining text accordingly, and made related changes; and added (c).

CASE NOTES

Analysis

Intent.
Lesser Included Offenses.

Intent.

By loading a shotgun and pointing it at the victims, defendant purposely created a substantial danger of death or physical injury under circumstances manifesting an extreme indifference to the value of human life; therefore, the evidence supported her conviction for aggravated assault under this section. It was not required that she intend harm to the victims. Warden v. State, 2011 Ark. App. 75, — S.W.3d — (2011).

Lesser Included Offenses.

Although there was not substantial evidence to support defendant's convictions for aggravated assault pursuant to § 5-13-204(a) with respect to defendant sideswiping a victim's vehicle on an interstate, under § 5-1-110(b), the evidence would clearly sustain convictions for the lesser-included offense of first degree assault under subsection (a) of this section; the testimony established defendant acted recklessly when he approached the victim's vehicle from the rear, going very fast, and in passing the victim's vehicle on the left, defendant sideswiped the vehicle. Mance v. State, 2010 Ark. App. 472, — S.W.3d — (2010).

Cited: Mullins v. State, 2009 Ark. App. 570, — S.W.3d — (2009).

5-13-207. Assault in the third degree.

CASE NOTES

Analysis

Acts Constituting Assault.
Evidence.

Acts Constituting Assault.

Where defendant admitted that he committed third-degree assault against victim by kicking and banging at the victim's door in an attempt to gain entry, the circuit court did not err in denying defendant's motion for directed verdict on the attempted burglary charge as defendant completed a substantial step towards entry by severely damaging victim's door and left only when the police were in the area. Davis v. State, 368 Ark. 380, 368 Ark. 351, 246 S.W.3d 433 (2007).

Evidence.

Defendant's motion for directed verdict was properly denied where there was sufficient evidence to convict defendant of residential burglary, § 5-39-201(a)(1), and third degree assault; defendant took steps to hinder the victim's ability to summon help by turning off the power and pulling out the phone lines, and the fact that defendant had a potentially deadly weapon on his person could at least raise an inference that he intended to, at the very least, place victim in fear for her physical well-being. Diggs v. State, 93 Ark. App. 332, 219 S.W.3d 654 (2005).

5-13-209. Abuse of athletic contest officials.

(a) A person commits abuse of an athletic official if, with the purpose of causing physical injury to another person, the person strikes or otherwise physically abuses an athletic contest official immediately prior to, during, or immediately following an interscholastic, intercollegiate, or any other organized amateur or professional athletic contest in which the athletic contest official is participating.

(b) Abuse of an athletic official is a Class A misdemeanor.

History. Acts 1987, No. 355, § 1; 2007, No. 827, § 28.

Amendments. The 2007 amendment subdivided the section as (a) and (b); added "A person commits abuse of an athletic official if" in (a); and made related and stylistic changes.

5-13-211. Aggravated assault upon a certified law enforcement officer or an employee of a correctional facility.

(a) A person commits aggravated assault upon a certified law enforcement officer or an employee of a correctional facility if, under circumstances manifesting extreme indifference to the personal hygiene of the certified law enforcement officer or employee of the correctional facility, the person purposely engages in conduct that creates a potential danger of infection to the certified law enforcement officer or an employee of any state or local correctional facility while the certified law enforcement officer or employee of the state or local correctional facility is engaged in the course of his or her employment by causing a person whom the actor knows to be a certified law enforcement officer or employee of the state or local correctional facility to come into contact with saliva, blood, urine, feces, seminal fluid, or

other bodily fluid by purposely throwing, tossing, expelling, or otherwise transferring the fluid or material.

(b) Aggravated assault upon a certified law enforcement officer or an employee of a correctional facility is a Class D felony.

History. Acts 1997, No. 1235, § 1; 2003, No. 1271, § 1; 2011, No. 277, § 1.

Amendments. The 2011 amendment inserted "a certified law enforcement officer" with minor variations throughout the section; and, in (a) inserted "a person whom the actor knows to be a certified law enforcement officer or," "purposely," and "or otherwise transferring."

CASE NOTES

Analysis

Evidence Sufficient to Revoke Suspended Sentence.
Information.

Evidence Sufficient to Revoke Suspended Sentence.

Defendant's suspended sentence was properly revoked based on committing an aggravated assault upon an employee of a correctional facility in violation of this section because there was ample evidence that he purposely spat on a deputy, resulting in his saliva coming in contact with the deputy under circumstances manifesting an extreme indifference to the deputy's personal hygiene. Foster v. State, 104 Ark. App. 108, 289 S.W.3d 476 (2008).

Information.

Defendant's claim that the state was required to prove the more onerous version of this statute was without merit as he failed to object to the sufficiency of the information before trial; further, defendant's claim could not prevail as he failed to show he was convicted under a statute that was no longer in effect. Barnes v. State, 94 Ark. App. 321, 230 S.W.3d 311 (2006).

Subchapter 3 — Terrorism

SECTION.
5-13-310. Terroristic act.

5-13-301. Terroristic threatening.

CASE NOTES

Analysis

Communication of Threat.
Defenses.
Evidence.
—Sufficient.

Communication of Threat.

Defendant's conviction for first-degree terroristic threatening pursuant to subdivision (a)(1)(A) of this section could not stand because there was no evidence, either direct or circumstantial, that it was defendant's conscious object that his threatening statements, made to his girlfriend, be communicated to the victim, his former wife. Turner v. State, 2010 Ark. App. 214, — S.W.3d — (2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 258 (May 6, 2010).

Defenses.

Trial court did not err in sustaining state's objection that the terms of the civil dispute regarding a loan and the collateral for the loan were irrelevant and in refusing to permit defendant to question the victim concerning the property that had been collateral for the loan because, even if the victim had lied regarding the terms of the loan, that would be no defense to the crimes for which he was convicted, which included kidnapping, terroristic threatening, and aggravated

assault. Tarpley v. State, 97 Ark. App. 122, 245 S.W.3d 192 (Dec. 13, 2006).

Evidence.

Offense of terroristic threatening required no more than the communication of a threat - by word or deed - with the purpose of terrorizing the victim, and the offense of aggravated assault was accomplished when defendant displayed the gun and pointed it at the victim; given the testimony that defendant kept the doorway blocked for several minutes after performing those acts and that the victim was prevented from summoning assistance during that time, the evidence was sufficient to sustain the kidnapping conviction. Tarpley v. State, 97 Ark. App. 122, 245 S.W.3d 192 (Dec. 13, 2006).

While defendant was staying with his girlfriend's family, he engaged in a verbal and physical altercation with the homeowner and his brother; during the melee, defendant pointed a gun at the victims, threatened to kill them, broke the kitchen window, and repeatedly struck the sliding-glass door. The Court of Appeals of Arkansas held that sufficient evidence supported defendant's conviction for first-degree terroristic threatening in violation of subdivision (a)(1)(A) of this section; the evidence presented to the jury was sufficient to show that defendant's purpose in wielding the gun was to terrorize both victims. Mullins v. State, 2009 Ark. App. 570, — S.W.3d — (2009).

State produced evidence that defendant pointed a gun at the victim and indicated more than one time that he would kill her, and the natural and probable result of such acts was that the person toward whom they were directed would be filled with intense fright; the state produced substantial evidence to support a finding that defendant acted with the intent of terrorizing the victim. Lasker v. State, 2009 Ark. App. 591, — S.W.3d — (2009).

Evidence was sufficient to support defendant's conviction for second-degree terroristic threatening in violation of subdivision (b)(1) of this section because the victim's testimony that defendant said, "Give me the gun, I'll shoot him," constituted sufficient evidence to support the conviction. Sims v. State, 2010 Ark. App. 133, — S.W.3d — (2010).

Pregnant wife's testimony that appellant pushed and threatened her — causing red marks on her neck and arm — was sufficient to prove by a preponderance that appellant violated the conditions of his suspended sentence by committing the criminal offenses of domestic battery in third degree, pursuant to § 5-26-305(b)(2)(A), and terroristic threatening in the second degree, under subdivision (b)(1) of this section. Autrand v. State, 2010 Ark. App. 245, — S.W.3d — (2010).

Evidence was sufficient to revoke defendant's suspended sentences due to his violation of conditions by second-degree terroristic threatening because the victim testified that defendant threatened to "get" her, which she interpreted as a threat to kill her. Brown v. State, 2010 Ark. App. 336, — S.W.3d — (2010).

As defendant hit the victim (his ex-wife's mother) in the head with the baseball bat and cut the victim's throat, threatened his ex-wife, and forced her to go with him from the scene of the crime, the evidence was sufficient to convict defendant of first-degree murder, kidnapping, and terroristic threatening under §§ 5-10-102(a)(2), 5-11-102(a), and subdivision (a)(1)(A) of this section. Alvard v. State, 2011 Ark. App. 160, — S.W.3d — (2011).

—Sufficient.

Evidence that two independent witnesses stated that they heard defendant threaten the victims, telling the victims defendant would find out where the victims lived and kill them, and that defendant's objective was to frighten the victims with death or serious injury by threatening them, was sufficient to support a conviction for terroristic threatening in the first degree under subdivision (a)(1)(A) of this section. Tatum v. State, 2011 Ark. App. 80, — S.W.3d — (2011).

5-13-310. Terroristic act.

(a) A person commits a terroristic act if, while not in the commission of a lawful act, the person:

(1) Shoots at or in any manner projects an object at a conveyance which is being operated or which is occupied by another person with the purpose to cause injury to another person or damage to property; or

(2) Shoots at an occupiable structure with the purpose to cause injury to a person or damage to property.

(b)(1) Upon conviction, any person who commits a terroristic act is guilty of a Class B felony.

(2) Upon conviction, any person who commits a terroristic act is guilty of a Class Y felony if the person with the purpose of causing physical injury to another person causes serious physical injury or death to any person.

(c) This section does not repeal any law or part of a law in conflict with this section, but is supplemental to the law or part of a law in conflict.

History. Acts 1975, No. 312, §§ 1-3; 1979, No. 428, § 1; A.S.A. 1947, §§ 41-1651, 41-1652, 41-1652n; Acts 1993, No. 544, § 1; 2005, No. 197, § 1; 2007, No. 827, § 29.

Amendments. The 2007 amendment deleted "For the purposes of this section" at the beginning of (a); inserted "Upon conviction" in (b)(1) and (2); deleted "as defined in subsection (a) of this section" following "terroristic act" in (b)(2); and made related and stylistic changes.

CASE NOTES

Analysis

Elements.
Multiple Offenses.
Sufficiency of Evidence.

Elements.

There was no violation of defendant's rights under § 5-1-110(a)(4) because when comparing the elements of the two offenses it was evident that the conduct of committing a terroristic act under this section was not a specific instance of conduct constituting first-degree battery under § 5-13-201. Warren v. State, 103 Ark. App. 124, 286 S.W.3d 768 (2008).

Multiple Offenses.

In a case involving terroristic acts, where three shots were fired into an automobile, because each terroristic act was a separate offense that could have been committed with or without a firearm, each crime was subject to a firearm enhancement under § 16-90-120. McKeever v. State, 367 Ark. 374, 240 S.W.2d 583 (2006).

After defendant was convicted of three counts of committing a terroristic act, in violation of subdivision (a)(1) of this section, the trial court did not err in imposing multiple firearm enhancements because defendant committed three separate criminal offenses, and each offense was committed with a firearm. McKeever v. State, 367 Ark. 374, 240 S.W.3d 583 (2006).

Sufficiency of Evidence.

In a case involving terroristic acts, the exclusion of a computer-generated threat to bolster a self-defense claim under § 5-2-606 was error since the evidence was relevant under Ark. R. Evid. 401; however, the error was harmless since evidence of other threats could have been elicited. McKeever v. State, 367 Ark. 374, 240 S.W.2d 583 (2006).

Evidence was sufficient to convict defendant of capital murder and a terroristic act when a witness, a retired deputy sheriff, described the perpetrator of a shooting, and defendant matched the description; moreover, a witness testified as to a possible motive, and defendant's relative testified that defendant had asked the relative to lie for defendant. Stephenson v. State, 373 Ark. 134, 282 S.W.3d 772 (2008).

Evidence that included defendant's firing a shot in the direction of a victim's truck, testimony of two individuals that

on separate occasions defendant told them he had shot a man, and defendant's evading the responding police was sufficient to convict defendant of commission of a terroristic act in violation of this section. Warren v. State, 103 Ark. App. 124, 286 S.W.3d 768 (2008).

Where defendant stepped out of his motel room and fired a .45 caliber semiautomatic pistol through the windshield of a nearby car, striking all three occupants and killing two of them, the evidence was sufficient to support defendant's conviction of committing a terroristic act under subdivisions (a)(1)(A) and (B) of this section as to the third victim because the evidence established that the third victim was shot in the foot, and the court rejected defendant's argument that the evidence was insufficient for failing to establish that the victim suffered a "serious physical injury" as that term is defined in § 5-1-102(21). The evidence was sufficient to establish that the victim suffered a serious physical injury because the victim suffered a gunshot wound from a .45 caliber semiautomatic pistol that was serious enough to warrant emergency medical care, the victim continued to experience pain and tenderness while walking and was often unable to wear shoes due to the lasting effects of the wound, and the victim was unable to participate in activities that he enjoyed before sustaining the injury, such as playing basketball, and had visible scarring from the entry and exit of the bullet; this evidence was sufficient to support the jury's factual finding that the victim suffered a serious physical injury as a result of defendant's actions. Butler v. State, 2009 Ark. App. 695, — S.W.3d — (2009).

Evidence that defendant shot his wife four times as she sat in her vehicle was sufficient to support his conviction for terroristic acts under this section, which only required proof that defendant shot at a "conveyance" occupied by the wife with the purpose of injuring her. Frost v. State, 2010 Ark. App. 163, — S.W.3d — (2010), rehearing denied, — Ark. App. —, — S.W.3d —, 2010 Ark. App. LEXIS 289 (Mar. 31, 2010).

In a case in which defendant was found guilty on three counts of attempted first-degree murder, of being a felon in possession of a firearm, and three counts of committing a terroristic act, he unsuccessfully argued that substantial evidence did not support his convictions; while the evidence was circumstantial, substantial evidence supported the conclusion that defendant committed the crimes in question. Moments after the shooting, a dark-colored car was observed speeding away from the area without its lights on even though it was dark outside, that car crashed into another vehicle five blocks from the shooting, a witness positively identified defendant as the person who emerged from the driver's side of the car carrying a long rifle, shell casings from a rifle were recovered from the scene of the shooting, defendant's DNA was found on the driver's side airbag of the car, and the car contained a letter addressed to defendant. Smith v. State, 2010 Ark. App. 216, — S.W.3d — (2010).

CHAPTER 14

SEXUAL OFFENSES

SUBCHAPTER.

RESEARCH REFERENCES

Ark. L. Notes. Sheppard, Arkansas 1, Texas 0: Sodomy Law Reform and the Arkansas Law, 2003 Arkansas L. Notes 87.

Subchapter 1 — General Provisions

Effective Dates. Acts 2007, No. 38, § 3: Jan. 30, 2007. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the current penalty classification for the offense of indecent exposure is not adequate to protect the children in this state from repeat offenders; that the Internet is being used as a tool by people that are attempting to sexually victimize children in the State of Arkansas; that the current penalty classification for the offense of Internet stalking of a child in certain situations is not adequate to protect the children in this state; and that this act is immediately necessary because of the public risk posed by sexual predators. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

Acts 2007, No. 392, § 2: Mar. 20, 2007. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the need to maintain correct information regarding the location of the residences of sex offenders is necessary to ensure the safety of the citizens of the State of Arkansas; that the provisions of this act will require sex offenders to maintain correct information on identification cards and driver's licenses; and that this act is necessary because of the public risk posed by sex offenders. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

Acts 2007, No. 394, § 11: Mar. 21, 2007. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the need to register and verify registration of sex offenders and sexually violent predators is necessary to ensure the safety of the citizens of the State of Arkansas; that the provisions of this act will improve the process of registering and verifying the registration of sex offenders and sexually violent predators; and that this act is

necessary because of the public risk posed by sex offenders and sexually violent predators. Therefore, an emergency is declared to exist and this act being necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

Acts 2011, No. 816, § 2: Mar. 30, 2011. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that high-level sex offenders oftentimes target young children as victims; that during the summer months, water parks are popular destinations for young children; and that this act is immediately necessary in order to have it effective before the late spring and summer of this year, when children will begin to go to water parks. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

5-14-101. Definitions.

As used in this chapter:

(1) "Deviate sexual activity" means any act of sexual gratification involving:

(A) The penetration, however slight, of the anus or mouth of a person by the penis of another person; or

(B) The penetration, however slight, of the labia majora or anus of a person by any body member or foreign instrument manipulated by another person;

(2) "Forcible compulsion" means physical force or a threat, express or implied, of death or physical injury to or kidnapping of any person;

(3) "Guardian" means a parent, stepparent, legal guardian, legal custodian, foster parent, or any person who by virtue of a living arrangement is placed in an apparent position of power or authority over a minor;

(4)(A) "Mentally defective" means that a person suffers from a mental disease or defect that renders the person:

(i) Incapable of understanding the nature and consequences of a sexual act; or

(ii) Unaware a sexual act is occurring.

(B) A determination that a person is mentally defective shall not be based solely on the person's intelligence quotient;

(5) "Mentally incapacitated" means that a person is temporarily incapable of appreciating or controlling the person's conduct as a result of the influence of a controlled or intoxicating substance:

(A) Administered to the person without the person's consent; or

(B) That renders the person unaware a sexual act is occurring;

(6) "Minor" means a person who is less than eighteen (18) years of age;

(7) "Physically helpless" means that a person is:
(A) Unconscious;
(B) Physically unable to communicate a lack of consent; or
(C) Rendered unaware a sexual act is occurring;
(8) "Public place" means a publicly or privately owned place to which the public or a substantial number of people have access;
(9) "Public view" means observable or likely to be observed by a person in a public place;
(10) "Sexual contact" means any act of sexual gratification involving the touching, directly or through clothing, of the sex organs, buttocks, or anus of a person or the breast of a female; and
(11) "Sexual intercourse" means penetration, however slight, of the labia majora by a penis.

History. Acts 1975, No. 280, § 1801; 1985, No. 327, § 1; 1985, No. 563, § 1; A.S.A. 1947, § 41-1801; Acts 1995, No. 525, § 1; 2001, No. 1724, § 1; 2009, No. 748, § 7.

Amendments. The 2009 amendment added present (6) and redesignated remaining subdivisions accordingly.

CASE NOTES

Analysis

Deviate Sexual Activity.
Forcible Compulsion.
Guardian.
Penetration.
Physically Helpless.
Sexual Contact.
Sexual Gratification.
Sexual Intercourse.

Deviate Sexual Activity.

Where the victim testified that defendant touched her "in a bad way" on ten occasions beginning when she was six and stated that on four occasions he made her touch his "weeny" and "go up and down on it", the testimony was sufficient to find that defendant engaged in "deviate sexual activity". Cox v. State, 93 Ark. App. 419, 220 S.W.3d 231 (2005).

Defendant's conviction for rape was upheld where the 16-year-old victim's testimony about her physical symptoms, when coupled with the testimony of the other witnesses, provided circumstantial evidence of penetration, which was an element of both rape by sexual intercourse and rape by deviate sexual activity. Marshall v. State, 94 Ark. App. 34, 223 S.W.3d 74 (2006).

Defendant's conviction for rape of his infant daughter was affirmed as the child showed signs of sexual abuse, including tears to the labia majora and minora that were consistent with trauma, immediately after being left with defendant, and defendant's semen was found on the child's diaper; thus, evidence was sufficient to find defendant engaged in deviate sexual activity. Terry v. State, 366 Ark. 441, 236 S.W.3d 495 (2006).

Evidence was sufficient to sustain defendant's rape conviction because defendant admitted that the six-year-old victim put her mouth on his penis and gave him oral sex, and a hair found on defendant's underwear was found to be microscopically similar to the sample provided by the victim. Bell v. State, 371 Ark. 375, 266 S.W.3d 696 (2007).

Evidence was sufficient to convict defendant under 18 U.S.C.S. § 2422(b) of attempting to persuade a minor to engage in sexual activity for which defendant could have been charged with a criminal offense, which under § 5-14-127(a)(1) and subdivision (1)(A) of this section included oral sex (which constituted "deviate sexual activity") with a person under age 16; evidence was offered that defendant discussed sexual activity with a 15-year-old victim, and there was sufficient evidence to establish that defendant knew that the victim was under 16 given defendant's behavior indicating a consciousness

of guilt, the victim's testimony, and the transcript of an online chat between defendant and a detective posing as the victim. United States v. Langley, 549 F.3d 726 (8th Cir. 2008).

Victim's testimony alone supported appellant's conviction for rape and sexual assault; moreover, the victim's testimony illustrated that there were several different actions of sexual assault and rape—acts that could each be separated in time as involving distinct impulses. Bryant v. State, 2010 Ark. 7, — S.W.3d — (2010).

Although appellant offered testimony that conflicted with the victim's testimony and the evidence presented at trial, the supreme court only needed to limit its review to those facts supporting the verdict to conclude that there was sufficient evidence to support the conviction of rape; the victim testified that she was forced to engage in deviate sexual activity with appellant and, after the attack, she ran from the house where she was eventually found by police. Although a semen sample collected during an examination did not match the DNA of appellant, but, rather that of the victim's fiance, the victim's testimony need not be corroborated; furthermore, it was for the jury to decide whether the testimony was credible. Hickey v. State, 2010 Ark. 109, — S.W.3d — (2010).

Defendant's conviction for attempted rape of his 13-year-old stepdaughter was supported by the evidence because the victim testified that defendant, who wanted oral sex from her, a deviate sexual activity under subdivision (1) of this section, thrust himself upon her while she was in the shower until her grandmother, who lived next door, appeared at the front door. Forrest v. State, 2010 Ark. App. 686, — S.W.3d — (2010).

Defendant's conviction for raping his seven-year-old daughter was proper because the victim's testimony that he "put his private part in her butt" was sufficient to sustain the conviction under § 5-14-103(a)(3)(A) and subdivision (1)(A) of this section; a nurse corroborated the victim's testimony in that the nurse found that the injuries to the victim's anus and hymen were consistent with penetration. Harlmo v. State, 2011 Ark. App. 314, — S.W.3d — (2011).

Forcible Compulsion.

Evidence was sufficient to convict defendant of rape where the victim, who had physical limitations, testified that defendant forced her to have sexual intercourse and to perform sexual acts on him after he entered her home under the pretext of using the telephone. Ellis v. State, 364 Ark. 538, 222 S.W.3d 192 (2006).

Rape victim's testimony was more than sufficient to show that the sex acts were against her will, and, thus, substantial evidence existed to support the element of forcible compulsion under subdivision (a)(1) of this section. Rounsaville v. State, 2009 Ark. 479, — S.W.3d — (2009).

Where the victim testified that defendant drove her to an unfamiliar area, poured each of them a shot glass of liquor, and forced her to have sexual intercourse with him against her will, the victim's testimony was sufficient to support defendant's conviction for rape in violation of subdivision (a)(1) of this section. The element of "forcible compulsion," as set forth in subdivision (2), was established by the victim's testimony that she told defendant that she "didn't want to do it;" she pushed him off her; and she fought him as he removed her clothes, but defendant's strength was such that she was unable to keep him from removing her clothes. Goodman v. State, 2009 Ark. App. 262, 306 S.W.3d 443 (2009).

After their relationship had ended, the victim testified that defendant forced her into the bedroom, removed their clothing, and forced her to have sexual relations while she either attempted to leave or kicked and pushed him; defendant told a detective that he knew the victim did not want to have sex with him. The Court of Appeals of Arkansas held that the evidence was sufficient to support defendant's convictions for two counts of rape under § 5-14-103(a)(1); the state did prove the element of forcible compulsion for purposes of subdivision (2) of this section. Henson v. State, 2009 Ark. App. 464, 320 S.W.3d 19 (2009).

At the hearing to revoke defendant's suspended imposition of sentence (SIS), the victim testified that defendant expressed his desire to touch and caress her, pinned her down despite her protests, and inserted his finger in her vagina. Because the victim's testimony reached all of the elements of rape described in this section,

the trial court did not err by revoking defendant's SIS. Ray v. State, 2009 Ark. App. 679, — S.W.3d — (2009).

Circuit court's decision to revoke probation on the ground that defendant had committed rape under § 5-14-103(a)(1) was not clearly against the preponderance of the evidence because defendant's pointing of a firearm at the victim was evidence of an implied threat of death or physical injury, and thus was forcible compulsion, as defined in subdivision (2) of this section. Craig v. State, 2010 Ark. App. 309, — S.W.3d — (2010).

Guardian.

Where it was shown that defendant acted as a stepfather toward the 15-year-old daughter of his girlfriend, he stood in the position of a guardian since he spoke of the victim as his daughter and attended school functions as a parent. Therefore, there was sufficient evidence to support a conviction for rape under § 5-14-103(a)(4)(A)(i) based on his sexual intercourse with the child. White v. State, 370 Ark. 284, 259 S.W.3d 410 (2007).

Where the evidence showed that defendant assumed the role of a father figure by paying bills, taking children on outings, and taking the victim to the emergency room, the evidence was sufficient to show that he was a guardian under subdivision (3) of this section for purposes of a rape conviction under § 5-14-103(4)(a)(A)(i). Thompson v. State, 99 Ark. App. 422, 262 S.W.3d 193 (2007).

Evidence produced by the state at trial was sufficient for the jury to reasonably conclude that, by virtue of the living arrangement, appellant was placed in an apparent position of power or authority over the minor victim and that appellant was thus the victim's guardian for the purposes of subdivision (3) of this section and §§ 5-14-103(a)(4)(A)(i) and 5-14-125(a)(4)(A)(iii), thus the jury verdict was supported by substantial evidence. Pack v. State, 2010 Ark. App. 82, — S.W.3d — (2010).

Penetration.

Evidence was sufficient to sustain defendant's rape conviction because the child victim testified that defendant put his "bad spot" in her mouth and "peed" in her mouth. She described his "bad spot" as looking like an elephant trunk and his "pee" as looking like "chicken noodle soup without the noodles or the chicken." Lamb v. State, 372 Ark. 277, 275 S.W.3d 144 (2008).

Defendant's conviction for rape was supported by the evidence because the 84-year-old victim testified that she awoke to find a young, nude, black man standing over her and that the man raped her; although the victim did not testify specifically about the penetration that occurred, the circumstantial evidence, specifically the testimony from an emergency room physician, established the element of penetration, as defined in subdivision (10) of this section. Young v. State, 374 Ark. 350, 288 S.W.3d 221 (2008).

In a case in which defendant appealed his conviction for rape of a 20-year old woman with a mental defect or mental incapacity, he unsuccessfully argued that there was insufficient evidence that penetration occurred. In addition to the testimony, there was also circumstantial medical evidence admitted that constituted substantial evidence to support the conviction; testimony from a nurse describing the procedure for taking the medical samples from inside the anus and vagina, together with evidence from the forensic experts concerning the presence of defendant's Y-chromosomal DNA on the victim's rectal swab, clearly gave rise to more than a mere suspicion and left little room for doubt that penetration occurred. Fernandez v. State, 2010 Ark. 148, — S.W.3d — (2010).

Victim's testimony was sufficient to convince the jury that there was penetration under subdivision (1)(B) of this section, as there was testimony from the victim's parent and a social worker that the victim told them that defendant touched the victim's "privates" under the victim's panties, and the victim testified that defendant touched the victim with defendant's fingers and knuckles and described the act of using them to separate the victim's labia majora. Montgomery v. State, 2010 Ark. App. 501, — S.W.3d — (2010).

Because a 12-year old child victim's uncorroborated testimony of penetration and vaginal and anal intercourse was sufficient to satisfy the statutory elements for rape, and because any inconsistencies were for the jury to resolve, defendant was properly convicted of violating subdivision (1) of this section and § 5-14-103(a)(3)(A).

Hawkins v. State, 2011 Ark. App. 164, — S.W.3d — (2011).

Physically Helpless.

Defendant's conviction for rape was upheld where there was ample testimony that the 16-year-old victim was at times unconscious, inebriated, "out of it," unable to stand, unable to walk, and unable to sit on a couch without falling off; there was also testimony that she had consumed approximately 12 shots of alcohol in a 20-minute period and, hence, was "physically helpless," as defined by subdivision (6) of this section. Marshall v. State, 94 Ark. App. 34, 223 S.W.3d 74 (2006).

Sexual Contact.

Trial court properly denied defendant's motion for a directed verdict during his trial for sexual assault of his daughter because the testimony of the victim that defendant "would rub my behind," and that he put his private part "in my behind," was substantial evidence of sexual contact under subdivision (9) of this section to support the guilty verdict. Brown v. State, 374 Ark. 341, 288 S.W.3d 226 (2008).

Where defendant advertised "erotic services" on the Internet, she met an undercover officer at a hotel, and stroked his penis during the course of performing a massage; the officer's testimony was sufficient to show sexual activity through sexual contact as defined by this section. Defendant was properly convicted of prostitution under § 5-70-102, and sentenced to non-reporting probation for six months. Arrigo v. State, 2009 Ark. App. 568, — S.W.3d — (2009).

Defendant's convictions for rape as a habitual offender were appropriate pursuant to § 5-14-103(a)(3)(A) and subdivision (10) of this section because the uncorroborated testimony of a rape victim alone was sufficient to sustain a conviction and the victim's testimony was substantial evidence supporting defendant's convictions. The victim testified consistently and with sufficient detail that defendant raped her and therefore, substantial evidence supported the convictions. Price v. State, 2010 Ark. App. 111, — S.W.3d — (2010).

To support a second-degree sexual assault conviction, pursuant to § 5-14-125(a)(3), the state did not have to provide direct proof that the act was done for sexual gratification because it could be assumed that the desire for sexual gratification was a plausible reason for sexual contact, as defined by subdivision (10) of this section. Ross v. State, 2010 Ark. App. 129, — S.W.3d — (2010).

In a case in which defendant appealed his conviction for sexual assault in the second degree, in violation of § 5-14-125(a)(4)(A)(iii), he argued unsuccessfully that the trial court erred in denying his motion for a directed verdict. The victim's testimony alone was sufficient to support defendant's conviction, and the jury was not required to believe defendant's testimony that he had not touched the victim's breast. Chavez v. State, 2010 Ark. App. 161, — S.W.3d — (2010).

Sexual Gratification.

Defendant's conviction for the rape of a seven-year-old boy, in violation of § 5-14-103(a)(3)(A), was proper because there was substantial evidence upon which the jury could have inferred that defendant's actions were motivated by a desire for sexual gratification, as defined in subdivision (1)(B) of this section; the jury could have found sexual gratification even if the only evidence presented was that defendant put his finger in the victim's anus. Rounsaville v. State, 374 Ark. 356, 288 S.W.3d 213 (2008).

Where defendant admitted that he inappropriately touched an eleven-year-old girl while she was sleeping, the jury could infer that his actions were motivated by a desire for sexual gratification within the meaning of subdivision (9) of this section. The evidence was sufficient to support his conviction for sexual assault in the second degree in violation of § 5-14-125(a)(3); the trial court did not err by denying his motion for a directed verdict. Davis v. State, 2009 Ark. App. 753, — S.W.3d — (2009).

Conviction for sexual assault in the second degree for violating § 5-14-125(a)(3) was supported by sufficient evidence because it was at least plausible that defendant's act of touching the victim's vaginal area with his foot, after which he ordered her not to tell anyone and later wrote a letter of apology, was done for the purpose of sexual gratification, pursuant to subdivision (10) of this section. Elliott v. State, 2010 Ark. App. 185, — S.W.3d — (2010).

Sexual Intercourse.

Evidence was sufficient to sustain a rape conviction because the victim gave unequivocal testimony that defendant engaged in acts of sexual intercourse, cunnilingus, or fellatio with her several times a week beginning when she was thirteen or fourteen years old. Keck v. State, 2009 Ark. App. 559, — S.W.3d — (2009).

Cited: Ward v. State, 370 Ark. 398, 260 S.W.3d 292 (2007); Rouzer v. State, 2009 Ark. App. 658, — S.W.3d — (2009); Stidam v. State, 2010 Ark. App. 278, — S.W.3d — (2010); Estrada v. State, 2011 Ark. 3, — S.W.3d — (2011).

5-14-102. In general.

CASE NOTES

Affirmative Defenses.

In a proceeding regarding placement on a child maltreatment registry, evidence that there was a mistake of age did not negate the finding of child maltreatment. C.C.B. v. Arkansas HHS, 368 Ark. 540, 247 S.W.3d 870 (2007).

Appellant's sexual assault conviction under § 5-14-127(a)(3) was affirmed where his argument that he reasonably believed that the victim was older than 16 was an affirmative defense under § 5-14-102(d)(1) and thus, the trial court properly concluded that he, rather than the State, bore the burden of proof under § 5-1-111(d)(1). Wright v. State, 98 Ark. App. 271, 254 S.W.3d 755 (2007).

5-14-103. Rape.

(a) A person commits rape if he or she engages in sexual intercourse or deviate sexual activity with another person:

(1) By forcible compulsion;

(2) Who is incapable of consent because he or she is:

(A) Physically helpless;

(B) Mentally defective; or

(C) Mentally incapacitated;

(3)(A) Who is less than fourteen (14) years of age.

(B) It is an affirmative defense to a prosecution under subdivision (a)(3)(A) of this section that the actor was not more than three (3) years older than the victim; or

(4)(A) Who is a minor and the actor is the victim's:

(i) Guardian;

(ii) Uncle, aunt, grandparent, step-grandparent, or grandparent by adoption;

(iii) Brother or sister of the whole or half blood or by adoption; or

(iv) Nephew, niece, or first cousin.

(B) It is an affirmative defense to a prosecution under subdivision (a)(4)(A) of this section that the actor was not more than three (3) years older than the victim.

(b) It is no defense to a prosecution under subdivisions (a)(3) or (4) of this section that the victim consented to the conduct.

(c)(1) Rape is a Class Y felony.

(2) Any person who pleads guilty or nolo contendere to or is found guilty of rape involving a victim who is less than fourteen (14) years of

age shall be sentenced to a minimum term of imprisonment of twenty-five (25) years.

(d)(1) A court may issue a permanent no contact order when:

(A) A defendant pleads guilty or nolo contendere; or

(B) All of the defendant's appeals have been exhausted and the defendant remains convicted.

(2) If a judicial officer has reason to believe that mental disease or defect of the defendant will or has become an issue in the case, the judicial officer shall enter such orders as are consistent with § 5-2-305.

History. Acts 1975, No. 280, § 1803; 1981, No. 620, § 12; 1985, No. 281, § 2; 1985, No. 919, § 2; A.S.A. 1947, § 41-1803; Acts 1993, No. 935, § 1; 1997, No. 831, § 1; 2001, No. 299, § 1; 2001, No. 1738, § 1; 2003, No. 1469, § 3; 2006 (1st Ex. Sess.), No. 5, § 2; 2009, No. 748, § 8.

Amendments. The 2009 amendment substituted "a minor" for "less than eighteen (18) years of age" in the introductory language of (a)(4)(A).

RESEARCH REFERENCES

ALR. Offense of Rape After Withdrawal of Consent. 33 A.L.R.6th 353.

U. Ark. Little Rock L. Rev. Annual Survey of Case Law: Criminal Law, 29 U. Ark. Little Rock L. Rev. 849.

CASE NOTES

Analysis

In General.
Evidence.
—Admissibility.
—Sufficiency.
—Testimony of Minor Victims.
Force or Restraint.
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Voir Dire.

In General.

Defendant's conviction for the crime of rape for engaging in sexual intercourse or deviate sexual activity with a person who was less than fourteen years old was reversed because the trial court repeatedly allowed an investigator to vouch for the credibility of the nine-year-old victim. Cox v. State, 93 Ark. App. 419, 220 S.W.3d 231 (2005).

Evidence.

Where defendant was charged with the anal rape of a nine-year-old, the trial court erred, at a rape-shield hearing, in granting defendant's request to introduce evidence of the victim's allegations of sexual abuse against three others in order to show that the victim obtained sexual knowledge from a source other than defendant where the victim's descriptions of the prior abuse and the charged act were very dissimilar. State v. Blandin, 370 Ark. 23, 257 S.W.3d 68 (2007).

Where it was shown that defendant acted as a stepfather toward the 15-year-old daughter of his girlfriend, he stood in the position of a guardian since he spoke of the victim as his daughter and attended school functions as a parent. Therefore, there was sufficient evidence to support a conviction for rape under subdivision (a)(4)(A)(i) of this section based on his sexual intercourse with the child. White v. State, 370 Ark. 284, 259 S.W.3d 410 (2007).

Where a victim testified that defendant put something inside of her body after he touched her private area, and she saw him

covering up his private area when she turned around, a motion for a directed verdict was properly denied since there was sufficient evidence to support a rape conviction under subdivision (a)(1)(C)(i) of this section. Other evidence supporting the conviction included a videotape of the victim's minor sister entering and exiting a shower, along with evidence of defendant's flight after being named a suspect. Ward v. State, 370 Ark. 398, 260 S.W.3d 292 (2007).

Evidence was sufficient to sustain defendant's rape conviction because defendant admitted that the six-year-old victim put her mouth on his penis and gave him oral sex, and a hair found on defendant's underwear was found to be microscopically similar to the sample provided by the victim. Bell v. State, 371 Ark. 375, 266 S.W.3d 696 (2007).

Where the evidence showed that defendant assumed the role of a father figure by paying bills, taking children on outings, and taking the victim to the emergency room, the evidence was sufficient to show that he was a guardian under § 5-14-101(3) for purposes of a rape conviction under subdivision (4)(a)(A)(i) of this section. Thompson v. State, 99 Ark. App. 422, 262 S.W.3d 193 (2007).

Evidence was sufficient to sustain defendant's rape conviction because the child victim testified that defendant put his "bad spot" in her mouth and "peed" in her mouth. She described his "bad spot" as looking like an elephant trunk and his "pee" as looking like "chicken noodle soup without the noodles or the chicken." Lamb v. State, 372 Ark. 277, 275 S.W.3d 144 (2008).

Evidence was sufficient to sustain rape convictions because the victim's testimony that she was fifteen years of age at the time of the two charged rapes, that she grew up in defendant's home and considered him her father, and that defendant engaged in sexual intercourse with her was sufficient. Moreover, the victim's testimony was corroborated by other reliable evidence including a forensic DNA analyst's testimony that the semen found on the sock and the underwear matched the DNA sample provided by defendant, along with the nurse practitioner's testimony that the victim's injuries were consistent with sexual abuse. Strong v. State, 372 Ark. 404, 277 S.W.3d 159 (2008).

Where defendant was charged with raping his three-year-old daughter in violation of this section, the victim was incompetent to testify; the trial court did not violate defendant's Sixth Amendment confrontation rights by allowing the child's mother and social worker were permitted to testify as to the child's hearsay statements of abuse. The child's statements were nontestimonial. Seely v. State, 373 Ark. 141, 282 S.W.3d 778 (2008), cert. denied, Seely v. State, — U.S. —, 129 S. Ct. 218, 172 L. Ed. 2d 169 (2008).

In a child rape case, defendant's half-brother's testimony regarding possibly consensual oral sex that occurred 17 years previously should have been excluded under Ark. R. Evid. 404(b) as too dissimilar in character and temporally removed from the crimes charged, which involved repeated anal sex with a girl from ages four to eight. The pedophile exception did not apply. Efird v. State, 102 Ark. App. 110, 282 S.W.3d 282 (2008), review denied, — Ark. —, — S.W.3d —, 2008 Ark. LEXIS 571 (Sept. 4, 2008).

Trial court did not err in permitting the state to introduce videotapes depicting defendant engaged in sexual acts with his minor victims and with each other because the video footage was relevant to proving the elements of both the charges of rape and the charges of engaging children in the production of child pornography and because it could not be said that the video served no valid purpose other than to inflame the passions of the jury. Williams v. State, 374 Ark. 282, 287 S.W.3d 559 (2008), rehearing denied, — Ark. —, — S.W.3d —, 2008 Ark. LEXIS 589 (Oct. 30, 2008).

Where defendant was charged with numerous counts of rape and engaging children in the production of child pornography, the probative value of a DVD depicting defendant engaged in sexual contact with the young boys was not substantially outweighed by the danger of unfair prejudice because the state had the burden of proving the elements of all of the charges against defendant and because the state was entitled to prove the elements of the charges with its best evidence and the videos were certainly the state's best evidence. Williams v. State, 374 Ark. 282, 287 S.W.3d 559 (2008), rehearing denied, — Ark. —, — S.W.3d —, 2008 Ark. LEXIS 589 (Oct. 30, 2008).

Defendant's conviction for the rape of a seven-year-old boy, in violation of subdivision (a)(3)(A) of this section, was proper because there was substantial evidence upon which the jury could have inferred that defendant's actions were motivated by a desire for sexual gratification, as defined in § 5-14-101(1)(B); the jury could have found sexual gratification even if the only evidence presented was that defendant put his finger in the victim's anus. Rounsaville v. State, 374 Ark. 356, 288 S.W.3d 213 (2008).

Defendant's conviction for rape, in violation of subdivision (a)(1) of this section, was supported by the evidence because the 84-year-old victim testified that she awoke to find a young, nude, black man standing over her and that the man raped her; a forensic DNA analyst testified that a semen sample found on the victim's nightgown contained DNA that matched the DNA of defendant. Young v. State, 374 Ark. 350, 288 S.W.3d 221 (2008).

Trial court did not err in denying defendant's motion for a directed verdict as there was sufficient evidence to support his conviction for the rape of a nine-year-old, in violation of subdivision (a)(3)(A) of this section; the victim's testimony constituted substantial evidence that defendant penetrated her vagina with his penis. Kelley v. State, 375 Ark. 483, 292 S.W.3d 297 (2009).

Rape victim's testimony was more than sufficient to show that the sex acts were against her will, and, thus, substantial evidence existed to support the element of forcible compulsion under subdivision (a)(1) of this section. Rounsaville v. State, 2009 Ark. 479, — S.W.3d — (2009).

Where the victim testified that defendant drove her to an unfamiliar area, poured each of them a shot glass of liquor, and forced her to have sexual intercourse with him against her will, the victim's testimony was sufficient to support defendant's conviction for rape in violation of subdivision (a)(1) of this section. Goodman v. State, 2009 Ark. App. 262, 306 S.W.3d 443 (2009).

Trial court did not err in denying defendant's motion for a directed verdict during his trial for the rape of his niece through marriage, in violation of subdivision (a)(4)(A)(ii) of this section, because the familial relationship extended to a relationship by affinity as well as a blood relationship; DNA testing confirmed that defendant was the biological father of the 15-year-old niece's child. Wade v. State, 2009 Ark. App. 346, 308 S.W.3d 178 (2009), rehearing denied, — Ark. App. —, — S.W.3d —, 2009 Ark. App. LEXIS 674 (June 3, 2009), review denied, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 576 (Sept. 10, 2009).

On two separate occasions after their relationship had ended, the victim testified that defendant forced her into the bedroom, removed their clothing, and forced her to have sexual relations while she either attempted to leave or kicked and pushed him; defendant told a detective that he knew the victim did not want to have sex with him. The Court of Appeals of Arkansas held that the evidence was sufficient to support defendant's convictions for two counts of rape under subdivision (a)(1) of this section. Henson v. State, 2009 Ark. App. 464, 320 S.W.3d 19 (2009).

Evidence was sufficient to sustain a rape conviction because the victim gave unequivocal testimony that defendant engaged in acts of sexual intercourse, cunnilingus, or fellatio with her several times a week beginning when she was thirteen or fourteen years old. Keck v. State, 2009 Ark. App. 559, — S.W.3d — (2009).

Defendant's eight-year-old daughter testified that he put cherry oil on her private parts and licked it off; she also testified that he put his private parts into her mouth. This testimony alone was sufficient to sustain defendant's conviction for rape in violation of subdivision (a)(3)(A) of this section. Rouzer v. State, 2009 Ark. App. 658, — S.W.3d — (2009).

At the hearing to revoke defendant's suspended imposition of sentence (SIS), the victim testified that defendant expressed his desire to touch and caress her, pinned her down despite her protests, and inserted his finger in her vagina. Because the victim's testimony reached all of the elements of rape under subsection (a) of this section, the trial court did not err by revoking defendant's SIS. Ray v. State, 2009 Ark. App. 679, — S.W.3d — (2009).

Evidence was sufficient to sustain defendant's conviction for rape where the victim's testimony, although uncorroborated, stated that defendant inserted his finger into her vagina, which clearly satisfied the statutory elements of rape un-

der subdivision (a)(4)(A)(i) of this section. Gilliland v. State, 2010 Ark. 135, — S.W.3d — (2010).

Victim's testimony that defendant raped the victim, the testimony of the victim's mother positively identifying defendant as the perpetrator, and DNA evidence that conclusively linked defendant to the victim constituted sufficient evidence to support defendant's rape conviction under subdivision (a)(1) of this section. Witcher v. State, 2010 Ark. 197, — S.W.3d — (2010).

Defendant's convictions for rape as a habitual offender were appropriate pursuant to subdivision (a)(3)(A) of this section and § 5-14-101(10) because the uncorroborated testimony of a rape victim alone was sufficient to sustain a conviction and the victim's testimony was substantial evidence supporting defendant's convictions. The victim testified consistently and with sufficient detail that defendant raped her and therefore, substantial evidence supported the convictions. Price v. State, 2010 Ark. App. 111, — S.W.3d — (2010).

Defendant's convictions for rape in violation of subdivision (a)(3)(A) of this section and sexual assault were appropriate because his sufficiency challenge was not preserved for review. In order to preserve a challenge to the sufficiency of the evidence, defendant was required to make a specific motion for a directed verdict that advised the trial court of the exact element of the crime that the state failed to prove; for that reason, his sufficiency challenge was not preserved. Stidam v. State, 2010 Ark. App. 278, — S.W.3d — (2010).

Sufficient evidence supported defendant's conviction for the rape of a person who was under the age of fourteen, a violation of subdivision (a)(3)(A) of this section, because the victim testified to at least two specific times when defendant had sex with her prior to her fourteenth birthday. The rape victim's testimony did not have to be corroborated, and scientific evidence was not required to support a rape conviction. Moss v. State, 2010 Ark. App. 395, — S.W.3d — (2010).

Defendant's conviction for rape of a minor grandchild in violation of this section was proper because the victim's testimony was sufficient to convince the jury that there was penetration to substantiate the charge of rape; the victim testified that the defendant touched the victim with defendant's fingers and knuckles and described the act of using them to separate the victim's labia majora. Montgomery v. State, 2010 Ark. App. 501, — S.W.3d — (2010).

Sufficient evidence supported defendant's rape conviction, under subdivision (a)(3)(A) of this section, because (1) the victim, who was less than 14 years old at the time, explicitly testified about two instances of sexual intercourse and at least three instances of deviate sexual activity with defendant, and (2) this testimony alone was sufficient to sustain a conviction. Coleman v. State, 2010 Ark. App. 597, — S.W.3d — (2010).

Defendant's conviction for attempted rape of his 13-year-old stepdaughter, in violation of subdivision (a)(3)(A) of this section and § 5-3-201(b), was supported by the evidence because the victim testified that defendant, who wanted oral sex from her, thrust himself upon her while she was in the shower until her grandmother, who lived next door, appeared at the front door. Forrest v. State, 2010 Ark. App. 686, — S.W.3d — (2010).

Where a victim testified that the man who had intercourse with her on the night in question, who was identified by the forensic evidence as defendant, did so by forcible compulsion, the testimony of the victim was, by itself, substantial evidence to support a conviction on a charge of rape. Walker v. State, 2010 Ark. App. 688, — S.W.3d — (2010).

There was sufficient evidence for a jury to convict defendant of rape. The victim testified that defendant had sexual intercourse with her several times from the time she was four years old until she was seven years old, and the victim's testimony alone was sufficient evidence to prove rape without corroboration or forensic findings. Estrada v. State, 2011 Ark. 3, — S.W.3d — (2011).

Because a 12-year old child victim's uncorroborated testimony of penetration and vaginal and anal intercourse was sufficient to satisfy the statutory elements for rape, and because any inconsistencies were for the jury to resolve, defendant was properly convicted of violating § 5-14-101(1) and subdivision (a)(3)(A) of this section. Hawkins v. State, 2011 Ark. App. 164, — S.W.3d — (2011).

Defendant's conviction for raping his seven-year-old daughter was proper be-

cause the victim's testimony that he "put his private part in her butt" was sufficient to sustain the conviction under subdivision (a)(3)(A) of this section and § 5-14-101(1)(A); a nurse corroborated the victim's testimony in that the nurse found that the injuries to the victim's anus and hymen were consistent with penetration. Harlmo v. State, 2011 Ark. App. 314, — S.W.3d — (2011).

Thirteen-year old victim's uncorroborated testimony that the victim and defendant had sex was sufficient to sustain defendant's conviction for rape under subdivision (a)(3)(A) of this section. Vance v. State, 2011 Ark. App. 413, — S.W.3d — (2011).

—Admissibility.

In defendant's trial for raping his step-granddaughter when she was six years old, the circuit court abused its discretion by granting defendant's motion to introduce evidence that his step-granddaughter was sexually assaulted by someone else when she was four years old; defendant's step-granddaughter's descriptions of the two incidents were substantially dissimilar and, because there was little evidence that the prior incident resembled the acts defendant allegedly committed, information about the prior incident was not relevant to the allegations against defendant. State v. Townsend, 366 Ark. 152, 233 S.W.3d 680 (2006).

—Sufficiency.

Evidence was sufficient to support defendant's conviction on three counts of rape of a 10-year old of a person who was less than 14 years of age where the victim testified that she was 10 years old at the time of the offenses and that defendant put his penis inside her vagina, anus, and mouth, and she gave a full accounting of his actions on the evening in question; this testimony alone was substantial evidence to support defendant's convictions. Parker v. State, 93 Ark. App. 472, 220 S.W.3d 238 (2005).

There was sufficient evidence to convict defendant of rape where the victim gave detailed testimony regarding the sexual assaults; the jury was free to find the victim a more credible witness despite certain inaccuracies in her testimony. Gillard v. State, 366 Ark. 217, 234 S.W.3d 310 (2006).

Defendant's conviction for rape of his infant daughter was affirmed as the child showed signs of sexual abuse immediately after being left with defendant, and defendant's semen was found on the child's diaper. Terry v. State, 366 Ark. 441, 236 S.W.3d 495 (2006).

Evidence was sufficient to sustain an attempted rape conviction where defendant initiated a call to the 13 year old victim, picked her up under false pretenses, isolated her in a motel room, told her that he and his girlfriend intended to engage in sexual intercourse with her, and he returned to the motel room with his girlfriend; those steps went beyond mere planning and preparation. Mitchem v. State, 96 Ark. App. 78, 238 S.W.3d 623 (2006).

Evidence was sufficient to support defendant's rape convictions where both victims stated in their interviews that defendant had sexual intercourse with them, both victims were under the age of 14, and medical evidence substantiated the victims' testimony. White v. State, 367 Ark. 595, 242 S.W.3d 240 (2006), rehearing denied, 367 Ark. 609, 242 S.W.3d 240 (2006), cert. denied, 550 U.S. 904, 127 S. Ct. 2114, 167 L. Ed. 2d 815 (2007).

Although appellant offered testimony that conflicted with the victim's testimony and the evidence presented at trial, the supreme court only needed to limit its review to those facts supporting the verdict to conclude that there was sufficient evidence to support the conviction of rape; the victim testified that she was forced to engage in deviate sexual activity with appellant and, after the attack, she ran from the house where she was eventually found by police. Although a semen sample collected during an examination did not match the DNA of appellant, but, rather that of the victim's fiance, the victim's testimony need not be corroborated; furthermore, it was for the jury to decide whether the testimony was credible. Hickey v. State, 2010 Ark. 109, — S.W.3d — (2010).

Evidence produced by the state at trial was sufficient for the jury to reasonably conclude that, by virtue of the living arrangement, appellant was placed in an apparent position of power or authority over the minor victim and that appellant was thus the victim's guardian for the purposes of subdivision (a)(4)(A)(i) of this

section and §§ 5-14-125(a)(4)(A)(iii) and 5-14-101(3), thus the jury verdict was supported by substantial evidence. Pack v. State, 2010 Ark. App. 82, — S.W.3d — (2010).

—Testimony of Minor Victims.

Victim's testimony alone supported appellant's conviction for rape and sexual assault; moreover, the victim's testimony illustrated that there were several different actions of sexual assault and rape—acts that could each be separated in time as involving distinct impulses. Bryant v. State, 2010 Ark. 7, — S.W.3d — (2010).

Force or Restraint.

In a case alleging rape, kidnapping, and third-degree domestic battery, a sufficiency of the evidence argument was not preserved for review because defendant argued on the first time on appeal that the amount of restraint or force used did not warrant a kidnapping conviction and a third-degree battery conviction in addition to the rape. This was not the same argument raised during a directed verdict motion. Rounsaville v. State, 372 Ark. 252, 273 S.W.3d 486 (2008).

Forcible Compulsion or Consent.

Evidence was sufficient to convict defendant of rape where the victim, who had physical limitations, testified that defendant forced her to have sexual intercourse and to perform sexual acts on him after he entered her home under the pretext of using the telephone. Ellis v. State, 364 Ark. 538, 222 S.W.3d 192 (2006).

Circuit court's decision to revoke probation on the ground that defendant had committed rape under subdivision (a)(1) of this section was not clearly against the preponderance of the evidence because defendant's pointing of a firearm at the victim was evidence of an implied threat of death or physical injury, and thus was forcible compulsion, pursuant to § 5-14-101(2). Craig v. State, 2010 Ark. App. 309, — S.W.3d — (2010).

Indictment or Information.

Defendant was not entitled to a bill of particulars, pursuant to § 16-85-301(a); a bill of particulars as to the precise time offenses were committed was not necessary because time was not material to allegations of rape, under this section, and sexual assault in the second degree, under § 5-14-125. Wallis v. State, 2010 Ark. App. 238, — S.W.3d — (2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 259 (May 6, 2010).

In a rape prosecution under subdivision (a)(3)(A) of this section, defendant's claim that the state did not prove sexual contact occurred on the date in the information failed because (1) the claim was unpreserved, as defendant did not contest the information before trial, and (2) a failure to specify the exact date and time of a crime was not fatal unless time was an essential element, and time was not an essential element of rape. Coleman v. State, 2010 Ark. App. 597, — S.W.3d — (2010).

Jurisdiction.

Inmate's appeal from the denial of his petition for a writ of habeas corpus was dismissed as the inmate could not state grounds on which to maintain his petition; appellate court rejected inmate's claim that the trial court did not have jurisdiction to charge him for the underlying conviction of rape of a person less than fourteen years old because inmate was charged within five years of the victim's 18th birthday and, therefore, was within the statute of limitations set forth in § 5-1-109(b)(1) and (h). Young v. Norris, 365 Ark. 219, 226 S.W.3d 797 (2006).

Lesser Included Offenses.

Trial court did not err during defendant's trial in refusing to instruct a jury on the lesser offense of sexual assault in the second degree, in violation of § 5-14-125(a)(3)(A)-(B), on one count of rape, in violation of subdivision (a)(3)(A) of this section, because sexual assault was not established by proof of the same or less than all of the elements required to establish rape, as required by § 5-1-110(b) to be a lesser-included offense. Joyner v. State, 2009 Ark. 168, 303 S.W.3d 54 (2009), cert. denied, Joyner v. Arkansas, — U.S. —, 130 S. Ct. 736, 175 L. Ed. 2d 514 (2009).

Penetration.

Defendant's conviction for rape was upheld where the 16-year-old victim's testimony about her physical symptoms, when coupled with the testimony of the other witnesses, provided circumstantial evidence of penetration, which was an element of both rape by sexual intercourse and rape by deviate sexual activity. Mar-

shall v. State, 94 Ark. App. 34, 223 S.W.3d 74 (2006).

In a case in which defendant appealed his conviction for rape of a 20-year old woman with a mental defect or mental incapacity, he unsuccessfully argued that there was insufficient evidence that penetration occurred. In addition to the testimony, there was also circumstantial medical evidence admitted that constituted substantial evidence to support the conviction; testimony from a nurse describing the procedure for taking the medical samples from inside the anus and vagina, together with evidence from the forensic experts concerning the presence of defendant's Y-chromosomal DNA on the victim's rectal swab, clearly gave rise to more than a mere suspicion and left little room for doubt that penetration occurred. Fernandez v. State, 2010 Ark. 148, — S.W.3d — (2010).

In defendant's prosecution under subdivision (a)(3)(A) of this section, evidence of penetration was sufficient because testimony of the victim's brother, the victim, a forensic examiner, and an expert sexual-assault nurse-examiner supported the jury's finding of penetration. Elliott v. State, 2010 Ark. App. 810, — S.W.3d — (2010).

Physically Helpless.

Allowing an alleged rape victim's prior sexual conduct into evidence was improper because defendant was charged with raping the victim while she was physically helpless and pursuant to subdivision (a)(2)(A) of this section, a person who was physically helpless at the time of the rape was incapable of consent. Therefore, any prior sexual encounters between defendant and the victim, which might have been relevant if consent was a defense, were irrelevant where the victim could not have consented due to being physically helpless. State v. Parker, 2010 Ark. 173, — S.W.3d — (2010), rehearing denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 315 (May 27, 2010).

Sentencing.

Trial court did not abuse its discretion in denying defendant's motion to reduce his life sentence for the rape of his minor daughter as numerous witnesses testified to the alleged abuse of the victim, including the victim herself, and a nurse examiner testified to signs of extensive and ongoing sexual abuse; based on this evidence, the jury's verdict did not appear to be the result of passion or prejudice. McDonald v. State, 364 Ark. 491, 221 S.W.3d 349 (2006).

Separate Offenses.

Defendant's acquittal of charges under 18 U.S.C.S. § 2423(a) in federal court did not operate as a bar to his statutory rape prosecution in state court as the underlying conduct upon which the federal conviction and Arkansas charge were based was not the same; a state jury's verdict that an act of statutory rape occurred in Arkansas would not necessarily be consistent with a federal jury's finding that, at the point in time when defendant transported the minor across state lines, he did not intend for the minor to engage in sexual activity. Winkle v. State, 366 Ark. 318, 235 S.W.3d 482 (2006).

Voir Dire.

In a rape prosecution under subdivision (a)(3)(A) of this section, it was not an abuse of discretion to overrule defendant's objection to the state's voir dire questions asking if jurors would require DNA evidence to convict a person of rape because (1) the prosecutor posed the question to discern if any jurors would require scientific evidence for a rape conviction, which was a legitimate purpose of voir dire, and (2) defendant could not show prejudice, as defendant did not seek a mistrial or admonition at trial. Coleman v. State, 2010 Ark. App. 597, — S.W.3d — (2010).

Cited: Rye v. State, 2009 Ark. App. 839, — S.W.3d — (2009).

5-14-110. Sexual indecency with a child.

(a) A person commits sexual indecency with a child if:

(1) Being eighteen (18) years of age or older, the person solicits another person who is less than fifteen (15) years of age or who is represented to be less than fifteen (15) years of age to engage in:

(A) Sexual intercourse;

(B) Deviate sexual activity; or

(C) Sexual contact;

(2)(A) With the purpose to arouse or gratify a sexual desire of himself or herself or a sexual desire of any other person, the person purposely exposes his or her sex organs to another person who is less than fifteen (15) years of age.

(B) It is an affirmative defense to a prosecution under subdivision (a)(2)(A) of this section if the person is within three (3) years of age of the victim; or

(3) With the purpose to arouse or gratify a sexual desire of himself or herself or a sexual desire of any other person, the person purposely exposes his or her sex organs to a minor, and the actor is:

(A) Employed with the Department of Correction, Department of Community Correction, any city or county jail, or any juvenile detention facility, and the minor is in custody at a facility operated by the agency or contractor employing the actor;

(B) A mandated reporter under § 12-18-402(b) and is in a position of trust or authority over the minor; or

(C) The minor's guardian, an employee in the minor's school or school district, a temporary caretaker, or a person in a position of trust and authority over the minor;

(4) With the purpose to arouse or gratify his or her sexual desire or a sexual desire of another person, a person who is eighteen (18) years of age or older causes or coerces a minor to expose his or her sex organs to another person, and the actor is:

(A) Employed with the Department of Correction, the Department of Community Correction, any city or county jail, or any juvenile detention facility, and the minor is in custody at a facility operated by the agency or contractor employing the actor;

(B) A mandated reporter under § 12-18-402(b) and is in a position of trust or authority over the minor; or

(C) The minor's guardian, an employee in the minor's school or school district, a temporary caretaker, or a person in a position of trust or authority over the minor; or

(5) Being eighteen (18) years of age or older, the person causes or coerces another person who is less than fourteen (14) years of age to expose his or her sex organs or the breast of a female with the purpose to arouse or gratify a sexual desire of himself, herself, or another person.

(b) Sexual indecency with a child is a Class D felony.

History. Acts 1975, No. 280, § 1810; A.S.A. 1947, § 41-1810; Acts 1995, No. 550, § 1; 2001, No. 1821, § 1; 2005, No. 1993, § 1; 2007, No. 531, § 1; 2009, No. 748, § 9; 2009, No. 758, § 1.

A.C.R.C. Notes. Acts 2009, No. 758, § 29, provided:

"Contingent Effectiveness. This act shall not become effective unless an act of the Eighty-Seventh General Assembly repealing the Arkansas Child Maltreatment Act, § 12-12-501 et seq., and enacting a new Child Maltreatment Act, § 12-18-101 et seq., becomes effective." The contingency in Acts 2009, No. 758, § 29, was met by Acts 2009, No. 749.

Amendments. The 2007 amendment added (a)(3) and (a)(4) and redesignated former (a)(3) as (a)(5).

The 2009 amendment by No. 748 substituted "a minor" for "another person who is less than eighteen (18) years of age" in (a)(3) and the present introductory language of (a)(4), redesignated (a)(4), and made related and minor stylistic changes.

The 2009 amendment by No. 758 substituted "mandated reporter under § 12-18-402(b)" for "professional under § 12-12-507(b)" in (a)(3)(B) and present (a)(4)(B).

5-14-111. Public sexual indecency.

CASE NOTES

Analysis

Burden of Proof.
Construction With Other Law.

Burden of Proof.

Appellant's sexual assault conviction under § 5-14-127(a)(3) was affirmed where his argument that he reasonably believed that the victim was older than 16 was an affirmative defense under § 5-14-102(d)(1) and thus, the trial court properly concluded that he, rather than the State, bore the burden of proof under § 5-1-111(d)(1). Wright v. State, 98 Ark. App. 271, 254 S.W.3d 755 (2007).

Construction With Other Law.

Sentencing court had authority to order the registration of a defendant as a sexual offender because the defendant's crime of public sexual indecency was classified as a sexual offense, under this section, and because § 12-12-903(12)(B)(ii) did not restrict the sentencing court's authority to order registration for a person's conviction as a sex offender for a sexual offense neither enumerated in § 12-12-903(12)(A)(i) nor included under the provisions of § 12-12-903(12)(B)(ii). Fountain v. State, 103 Ark. App. 15, 285 S.W.3d 706 (2008).

5-14-112. Indecent exposure.

(a) A person commits indecent exposure if, with the purpose to arouse or gratify a sexual desire of himself or herself or of any other person, the person exposes his or her sex organs:

(1) In a public place or in public view; or

(2) Under circumstances in which the person knows the conduct is likely to cause affront or alarm.

(b)(1) Except as provided in subdivisions (b)(2) and (b)(3) of this section, indecent exposure is a Class A misdemeanor.

(2) For a fourth or fifth conviction within ten (10) years of a previous conviction, indecent exposure is a Class D felony.

(3) For a sixth conviction and each successive conviction within ten (10) years of a previous conviction, indecent exposure is a Class C felony.

(c) A woman is not in violation of this section for breastfeeding a child in a public place or any place where other individuals are present.

History. Acts 1975, No. 280, § 1812; A.S.A. 1947, § 41-1812; Acts 1997, No. 817, § 1; 2001, No. 1553, § 7; 2001, No. 1665, § 1; 2001, No. 1821, § 2; 2003, No. 862, § 1; 2005, No. 1815, § 1; 2005, No. 1962, § 5; 2007, No. 38, § 1; No. 680, § 1.

Amendments. The 2007 amendment by No. 38 added (b)(2) and (3); and added "Except as provided in subdivisions (b)(2) and (b)(3) of this section" at the beginning of (b)(1).

The 2007 amendment by No. 680 added (c).

5-14-122. Bestiality.

(a) As used in this section, "animal" means any dead or alive nonhuman vertebrate.

(b) A person commits bestiality if he or she performs or submits to any act of sexual gratification with an animal involving his or her or the animal's sex organs and the mouth, anus, penis, or vagina of the other.

(c) Bestiality is a Class A misdemeanor.

History. Acts 1977, No. 828, § 1; A.S.A. 1947, § 41-1813; Acts 2005, No. 1994, § 496; 2007, No. 827, § 30.

Amendments. The 2007 amendment substituted "his or her or the animal's sex organs" for "the sex organs of the one" in (b).

RESEARCH REFERENCES

Ark. L. Notes. Sheppard, Arkansas 1, Texas 0: Sodomy Law Reform and the Arkansas Law, 2003 Arkansas L. Notes 87.

5-14-123. Exposing another person to human immunodeficiency virus.

CASE NOTES

Analysis

Evidence.
Severance.
Subpoena.

Evidence.

Where the evidence showed that defendant had vaginal sexual intercourse with a child, and he had been diagnosed with the Human Immuno-Deficiency Virus, there was sufficient evidence to support his conviction under this section. White v. State, 370 Ark. 284, 259 S.W.3d 410 (2007).

Severance.

Trial court was not required to sever a charge for exposure to the Human Immuno-Deficiency Virus (HIV) under Ark. R. Crim. P. 22.2 because the exposure to HIV was committed as part of a single scheme with a sexual assault in the fourth degree. It was discretionary whether or not to sever under Rule 22.2(b)(i). White v. State, 370 Ark. 284, 259 S.W.3d 410 (2007).

Subpoena.

Health Insurance Portability and Accountability Act of 1996 does not limit a state's authority to investigate crimes; therefore, there was no error committed by the prosecution's decision to subpoena a nurse practitioner to testify that defendant had tested positive for the Human Immuno-Deficiency Virus. White v. State, 370 Ark. 284, 259 S.W.3d 410 (2007).

5-14-124. Sexual assault in the first degree.

(a) A person commits sexual assault in the first degree if the person engages in sexual intercourse or deviate sexual activity with a minor who is not the actor's spouse and the actor is:

(1) Employed with the Department of Correction, the Department of Community Correction, the Department of Human Services, or any city or county jail or a juvenile detention facility, and the victim is in the custody of the Department of Correction, the Department of Commu-

nity Correction, the Department of Human Services, any city or county jail or juvenile detention facility, or their contractors or agents;

(2) A mandated reporter under § 12-18-402(b) and is in a position of trust or authority over the victim and uses the position of trust or authority to engage in sexual intercourse or deviate sexual activity; or

(3) An employee in the victim's school or school district, a temporary caretaker, or a person in a position of trust or authority over the victim.

(b) It is no defense to a prosecution under this section that the victim consented to the conduct.

(c) It is an affirmative defense to a prosecution under subdivision (a)(3) of this section that the actor was not more than three (3) years older than the victim.

(d) Sexual assault in the first degree is a Class A felony.

History. Acts 2001, No. 1738, § 2; 2003, No. 1391, § 1; 2003, No. 1469, § 2; 2009, No. 748, § 10; 2009, No. 758, § 2.

A.C.R.C. Notes. Acts 2009, No. 758, § 29, provided:

"Contingent Effectiveness. This act shall not become effective unless an act of the Eighty-Seventh General Assembly repealing the Arkansas Child Maltreatment Act, § 12-12-501 et seq., and enacting a new Child Maltreatment Act, § 12-18-101 et seq., becomes effective." The contingency in Acts 2009, No. 758, § 29, was met by Acts 2009, No. 749.

Amendments. The 2009 amendment by No. 748 substituted "a minor" for "another person who is less than eighteen (18) years of age" in (a).

The 2009 amendment by No. 758 deleted "Health and" following "Department of" in two places in (a)(1), and substituted "mandated reporter under §12-18-402(b)" for "professional under §12-12-507(b)" in (a)(2).

CASE NOTES

Analysis

Evidence.
Illustrative Cases.

Evidence.

Evidence that a victim, who was a 14-year-old student of defendant, touched defendant on her breast was admissible in defendant's trial for first-degree sexual assault under this section because it was independently relevant and fell within the pedophile exception to Ark. R. Evid. 404(b); the incidents corroborated the victim's testimony and established that defendant had a proclivity to engage in sexual acts with minors with whom she had an intimate relationship. Bobo v. State, 102 Ark. App. 329, 285 S.W.3d 270 (2008), rehearing denied, — Ark. App. —, — S.W.3d —, 2008 Ark. App. LEXIS 533 (June 25, 2008), review denied, — Ark. —, — S.W.3d —, 2008 Ark. LEXIS 595 (Oct. 30, 2008).

Defendant was a close friend of the victim's family and the victim was frequently allowed to spend the night in defendant's home while visiting defendant's son; the evidence of defendant's close friendship with the victim's parents, and of their frequent entrustment of the victim to defendant's care and supervision, was sufficient to support the finding that defendant was a temporary caretaker or in a position of trust over the victim. Rasmussen v. State, 2009 Ark. App. 586, — S.W.3d — (2009).

Illustrative Cases.

Defendant's conviction for first-degree sexual assault against a minor female was supported by sufficient evidence where defendant had a longstanding relationship with the minor as her instructor and with her parents, who trusted him to oversee her tae kwon do instruction and competitions, and her transportation home; a family friend to whom a minor is entrusted is in a position of authority or trust over that minor during the time of entrustment, and defendant's relationship could be characterized, at a mini-

mum, to be that of a chaperone, which met the statutory threshold. May v. State, 94 Ark. App. 202, 228 S.W.3d 517 (2006).

Cited: State v. Hayes, 366 Ark. 199, 234 S.W.3d 307 (2006).

5-14-125. Sexual assault in the second degree.

(a) A person commits sexual assault in the second degree if the person:

(1) Engages in sexual contact with another person by forcible compulsion;

(2) Engages in sexual contact with another person who is incapable of consent because he or she is:

(A) Physically helpless;

(B) Mentally defective; or

(C) Mentally incapacitated;

(3) Being eighteen (18) years of age or older, engages in sexual contact with another person who is:

(A) Less than fourteen (14) years of age; and

(B) Not the person's spouse;

(4)(A) Engages in sexual contact with a minor and the actor is:

(i) Employed with the Department of Correction, Department of Community Correction, any city or county jail, or any juvenile detention facility, and the minor is in custody at a facility operated by the agency or contractor employing the actor;

(ii) A mandated reporter under § 12-18-402(b) and is in a position of trust or authority over the minor; or

(iii) The minor's guardian, an employee in the minor's school or school district, a temporary caretaker, or a person in a position of trust or authority over the minor.

(B) For purposes of subdivision (a)(4)(A) of this section, consent of the minor is not a defense to a prosecution;

(5)(A) Being a minor, engages in sexual contact with another person who is:

(i) Less than fourteen (14) years of age; and

(ii) Not the person's spouse.

(B) It is an affirmative defense to a prosecution under this subdivision (a)(5) that the actor was not more than:

(i) Three (3) years older than the victim if the victim is less than twelve (12) years of age; or

(ii) Four (4) years older than the victim if the victim is twelve (12) years of age or older; or

(6) Is a teacher, principal, athletic coach, or counselor in a public school in a grade kindergarten through twelve (K-12) and engages in sexual contact with another person who is:

(A) A student enrolled in the public school; and

(B) Less than twenty-one (21) years of age.

(b)(1) Sexual assault in the second degree is a Class B felony.

(2) Sexual assault in the second degree is a Class D felony if committed by a minor with another person who is:

(A) Less than fourteen (14) years of age; and
(B) Not the person's spouse.

History. Acts 2001, No. 1738, § 3; 2003, No. 1323, § 1; 2003, No. 1720, § 2; 2009, No. 748, §§ 11–13; 2009, No. 758, § 3; 2011, No. 1129, § 1.

Acts 2009, No. 758, § 29, provided:

"Contingent Effectiveness. This act shall not become effective unless an act of the Eighty-Seventh General Assembly repealing the Arkansas Child Maltreatment Act, § 12-12-501 et seq., and enacting a new Child Maltreatment Act, § 12-18-101 et seq., becomes effective." The contingency in Acts 2009, No. 758, § 29, was met by Acts 2009, No. 749.

Amendments. The 2009 amendment by No. 748 substituted "a minor" for "another person who is less than eighteen (18) years of age" in (a)(4)(A), (a)(5)(A), and (b)(2).

The 2009 amendment by No. 758 substituted "mandated reporter under §12-18-402(b)" for "professional under §12-12-507(b)" in (a)(4)(A)(ii).

The 2011 amendment inserted "principal, athletic coach, or counselor" in (a)(6).

CASE NOTES

Analysis

Applicability.
Appellate Review.
Evidence.

Applicability.

Trial court did not err during defendant's trial in refusing to instruct a jury on the lesser offense of sexual assault in the second degree, in violation of subdivisions (a)(3)(A)-(B) of this section, on one count of rape, in violation of § 5-14-103(a)(3)(A), because sexual assault was not established by proof of the same or less than all of the elements required to establish rape, as required by § 5-1-110(b) to be a lesser-included offense. Joyner v. State, 2009 Ark. 168, 303 S.W.3d 54 (2009), cert. denied, Joyner v. Arkansas, — U.S. —, 130 S. Ct. 736, 175 L. Ed. 2d 514 (2009).

Defendant was not entitled to a bill of particulars, pursuant to § 16-85-301(a); a bill of particulars as to the precise time offenses were committed was not necessary because time was not material to allegations of rape, under § 5-14-103, and sexual assault in the second degree, under this section. Wallis v. State, 2010 Ark. App. 238, — S.W.3d — (2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 259 (May 6, 2010).

In a family doctor's trial on two counts of second-degree sexual abuse, violations of this section, there was sufficient evidence that defendant used forcible compulsion to perpetrate the crimes where in each victim's sexual assault, there was forcible compulsion in the form of physical force or the threat of physical injury separate from the touching required for sexual contact. Arendall v. State, 2010 Ark. App. 358, — S.W.3d — (2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 367 (June 24, 2010).

Trial court did not abuse its discretion in denying defendant's post-trial request for a sentence reduction pursuant to § 16-90-107(e) because defendant's 20-year sentence for second degree sexual assault, in violation of this section, fell within the statutory range. Brown v. State, 2010 Ark. 420, — S.W.3d — (2010).

Appellate Review.

Defendant's second-degree sexual assault conviction, pursuant to subdivision (a)(3) of this section, was proper because defendant's argument that the state failed to offer proof that defendant touched the victim for the purpose of obtaining sexual gratification was not raised below. Ross v. State, 2010 Ark. App. 129, — S.W.3d — (2010).

Evidence.

Evidence was sufficient to support defendant's conviction for second-degree sexual assault where the victim and a witness both testified that defendant pulled down the victim's pants and was touching her, despite defendant's contention that he was merely examining a bug bite when he removed the clothes. Hull v. State, 96 Ark. App. 280, 241 S.W.3d 302 (2006).

Trial court properly denied defendant's motion for a directed verdict during his trial for sexual assault of his daughter, in violation of subdivision (a)(3) of this section, because the testimony of the victim that defendant "would rub my behind," and that he put his private part "in my behind," was substantial evidence to support the guilty verdict. Brown v. State, 374 Ark. 341, 288 S.W.3d 226 (2008).

Where the child victim testified that defendant inappropriately touched her and sexually penetrated her, the evidence was sufficient to support his conviction for second-degree sexual assault under this section. Swaim v. State, 2009 Ark. App. 557, — S.W.3d — (2009).

Where defendant admitted that he inappropriately touched an eleven-year-old girl while she was sleeping, the jury could infer that his actions were motivated by a desire for sexual gratification. The evidence was sufficient to support his conviction for sexual assault in the second degree in violation of subdivision (a)(3) of this section; the trial court did not err by denying his motion for a directed verdict. Davis v. State, 2009 Ark. App. 753, — S.W.3d — (2009).

Victim's testimony alone supported appellant's conviction for rape and sexual assault; moreover, the victim's testimony illustrated that there were several different actions of sexual assault and rape—acts that could each be separated in time as involving distinct impulses. Bryant v. State, 2010 Ark. 7, — S.W.3d — (2010).

Evidence produced by the state at trial was sufficient for the jury to reasonably conclude that, by virtue of the living arrangement, appellant was placed in an apparent position of power or authority over the minor victim and that appellant was thus the victim's guardian for the purposes of subdivision (a)(4)(A)(iii) of this section and §§ 5-14-103(a)(4)(A)(i) and 5-14-101(3), thus the jury verdict was supported by substantial evidence. Pack v. State, 2010 Ark. App. 82, — S.W.3d — (2010).

To support a second-degree sexual assault conviction, pursuant to subdivision (a)(3) of this section, the state did not have to provide direct proof that the act was done for sexual gratification because it could be assumed that the desire for sexual gratification was a plausible reason for sexual contact, as defined by § 5-14-101(10). Ross v. State, 2010 Ark. App. 129, — S.W.3d — (2010).

In a case in which defendant appealed his conviction for sexual assault in the second degree, in violation of subdivision (a)(4)(A)(iii) of this section, he argued unsuccessfully that the trial court erred in denying his motion for a directed verdict. The victim's testimony alone was sufficient to support defendant's conviction, and the jury was not required to believe defendant's testimony that he had not touched the victim's breast. Chavez v. State, 2010 Ark. App. 161, — S.W.3d — (2010).

In a case in which defendant appealed his conviction for sexual assault in the second degree, in violation of subdivision (a)(4)(A)(iii) of this section, he complained that a transcript of his interview at the police department was obtained with the assistance of a translator who was not certified by the Administrative Office of the Courts and was admitted into evidence in violation of Ark. R. Evid. 1009. While it was true that the translation was not made by a qualified translator as set forth in Rule 1009, and defendant objected on that basis, he did not object to the admission of the transcript at trial; in fact, his attorney stipulated at trial that the transcript reflected the interview; furthermore, the victim's testimony alone is sufficient to support defendant's conviction. Chavez v. State, 2010 Ark. App. 161, — S.W.3d — (2010).

Conviction for sexual assault in the second degree for violating subdivision (a)(3) of this section was supported by sufficient evidence because it was at least plausible that defendant's act of touching the victim's vaginal area with his foot, after which he ordered her not to tell anyone and later wrote a letter of apology, was done for the purpose of sexual gratification. Elliott v. State, 2010 Ark. App. 185, — S.W.3d — (2010).

Despite the large amount of time between the events giving rise to a witness's testimony and defendant's trial for second degree sexual assault, in violation of this section, evidence about an alleged sexual assault occurring 34 years prior was relevant to defendant's character and as an aggravating circumstance under § 16-97-103. Brown v. State, 2010 Ark. 420, — S.W.3d — (2010).

Eight-year-old victim's testimony alone was sufficient evidence to support defendant's conviction for second degree sexual assault in violation of this section. The victim's parents and a police detective also told the jury that the victim had recounted the same information to them. To the extent there were inconsistencies in the victim's testimony, or that of other state witnesses, it was a matter of credibility and was for the jury to decide. Brown v. State, 2010 Ark. 420, — S.W.3d — (2010).

There was sufficient evidence for a jury to convict defendant of first-degree sexual abuse. The state proved sexual contact through the victim's testimony that defendant rubbed his penis on her vagina. Estrada v. State, 2011 Ark. 3, — S.W.3d — (2011).

Cited: Small v. State, 371 Ark. 244, 264 S.W.3d 512 (2007).

5-14-126. Sexual assault in the third degree.

(a) A person commits sexual assault in the third degree if the person:

(1) Engages in sexual intercourse or deviate sexual activity with another person who is not the actor's spouse, and the actor is:

(A) Employed with the Department of Correction, Department of Community Correction, Department of Human Services, or any city or county jail, and the victim is in the custody of the Department of Correction, Department of Community Correction, Department of Human Services, or any city or county jail;

(B) Employed or contracted with or otherwise providing services, supplies, or supervision to an agency maintaining custody of inmates, detainees, or juveniles, and the victim is in the custody of the Department of Correction, Department of Community Correction, Department of Human Services, or any city or county jail; or

(C) A mandated reporter under § 12-18-402(b) or a member of the clergy and is in a position of trust or authority over the victim and uses the position of trust or authority to engage in sexual intercourse or deviate sexual activity; or

(2)(A) Being a minor, engages in sexual intercourse or deviate sexual activity with another person who is:

(i) Less than fourteen (14) years of age; and

(ii) Not the person's spouse.

(B) It is an affirmative defense under this subdivision (a)(2) that the actor was not more than three (3) years older than the victim.

(b) It is no defense to a prosecution under this section that the victim consented to the conduct.

(c) Sexual assault in the third degree is a Class C felony.

History. Acts 2001, No. 1738, § 4; 2003, No. 1324, § 1; 2007, No. 363, § 1; 2009, No. 748, § 14; 2009, No. 758, § 4.

A.C.R.C. Notes. Acts 2009, No. 758, § 29, provided: "Contingent Effectiveness. This act shall not become effective unless an act of the Eighty-Seventh General Assembly repealing the Arkansas Child Maltreatment Act, § 12-12-501 et seq., and enacting a new Child Maltreatment Act, § 12-18-101 et seq., becomes effective." The contingency in Acts 2009, No. 758, § 29, was met by Acts 2009, No. 749.

Amendments. The 2007 amendment added (a)(1)(B), redesignated former (a)(1)(B) as present (a)(1)(C); and made a related change.

The 2009 amendment by No. 748 substituted "a minor" for "under eighteen (18) years of age" in the introductory language of (a)(2)(A).

The 2009 amendment by No. 758 substituted "mandated reporter under §12-

18-402(b)" for "professional under §12-12-507(b)" in (a)(1)(C).

CASE NOTES

Analysis

Constitutionality.
Evidence.
Statute of Limitations.

Constitutionality.

Defendant's due process and equal protection rights were not violated when he was convicted of violating subdivision (a)(1)(B) of this section as he was not prosecuted for consensual sexual acts with the two victims, rather, he was prosecuted for using his position of trust and authority over the victims to engage in those acts; because the clergy was held in such a high regard, there was a legitimate reason for the state to criminalize a clergyman's abuse of his trust and authority to procure sex. Talbert v. State, 367 Ark. 262, 239 S.W.3d 504 (2006).

Subdivision (a)(1)(B) of this section is not unconstitutionally vague as, after reading the statute's language, a person of ordinary intelligence would not believe that it was a crime, per se, for a member of the clergy to have a consensual relationship with someone; the statute makes clear that a clergyman must have misused his position of trust and authority to engage in a sexual relationship for a violation to occur. Talbert v. State, 367 Ark. 262, 239 S.W.3d 504 (2006).

Evidence.

Evidence was sufficient to support defendant's conviction for sexual assault in the third degree where testimony of the victims did not indicate a consensual relationship: (1) both victims testified that they looked up to defendant as a minister and trusted him; (2) one victim testified that she was afraid of what might happen to her if she did not comply with his sexual requests; (3) that victim also testified that she was not attracted to defendant; (4) and the second victim testified that she told defendant that, because he was a minister, sex was not right. Talbert v. State, 367 Ark. 262, 239 S.W.3d 504 (2006).

Statute of Limitations.

There was sufficient evidence that the sexual assault against one victim occurred in 2002 and, therefore, was within the three-year statute of limitations of § 5-1-109(b)(2) where the victim testified that defendant, a minister, assaulted her while she was working for the church during the summer of 2002. Talbert v. State, 367 Ark. 262, 239 S.W.3d 504 (2006).

5-14-127. Sexual assault in the fourth degree.

(a) A person commits sexual assault in the fourth degree if the person:

(1) Being twenty (20) years of age or older:

(A) Engages in sexual intercourse or deviate sexual activity with another person who is:

(i) Less than sixteen (16) years of age; and

(ii) Not the person's spouse; or

(B) Engages in sexual contact with another person who is:

(i) Less than sixteen (16) years of age; and

(ii) Not the person's spouse; or

(2) Engages in sexual contact with another person who is not the actor's spouse, and the actor is employed with the Department of Correction, Department of Community Correction, Department of Human Services, or any city or county jail, and the victim is in the custody of the Department of Correction, Department of Community Correction, Department of Human Services, or a city or county jail.

(b)(1) Sexual assault in the fourth degree under subdivisions (a)(1)(A) and (a)(2) of this section is a Class D felony.

(2) Sexual assault in the fourth degree under subdivision (a)(1)(B) of this section is a Class A misdemeanor if the person engages only in sexual contact with another person as described in subdivision (a)(1)(B) of this section.

History. Acts 2001, No. 1738, § 5; 2003, No. 1325, § 1; 2009, No. 630, § 1.

Amendments. The 2009 amendment, in (a), inserted (a)(2) and redesignated the remaining subdivisions; in (b), substituted "subdivisions (a)(1)(A) and (a)(2)" for "subdivision (a)(1)" in (b)(1), and substituted "(a)(1)(B)" for "(a)(2)" twice in (b)(2); and made related changes.

CASE NOTES

Analysis

Burden of Proof.
Evidence.
Severance.

Burden of Proof.

Appellant's sexual assault conviction under § 5-14-127(a)(3) was affirmed where his argument that he reasonably believed that the victim was older than 16 was an affirmative defense under § 5-14102(d)(1) and thus, the trial court properly concluded that he, rather than the State bore the burden of proof under§ 5-1-111(d)(1). Wright v. State, 98 Ark. App. 271, 254 S.W.3d 755 (2007).

Evidence.

There was sufficient evidence to support a conviction for sexual assault in the fourth degree arising out of sexual intercourse with child because she was under the age of sixteen, and defendant was at least 20 years old. White v. State, 370 Ark. 284, 259 S.W.3d 410 (2007).

Evidence was sufficient to convict defendant under 18 U.S.C.S. § 2422(b) of attempting to persuade a minor to engage in sexual activity for which defendant could have been charged with a criminal offense, which under subdivision (a)(1) of this section and § 5-14-101(1)(A) included oral sex with a person under age 16; evidence was offered that defendant discussed sexual activity with a 15-year-old victim, and there was sufficient evidence to establish that defendant knew that the victim was under 16 given defendant's behavior indicating a consciousness of guilt, the victim's testimony, and the transcript of an online chat between defendant and a detective posing as the victim. United States v. Langley, 549 F.3d 726 (8th Cir. 2008).

Severance.

Trial court was not required to sever a charge for exposure to the Human Immuno-Deficiency Virus (HIV) under Ark. R. Crim. P. 22.2 because the exposure to HIV was committed as part of a single scheme with a sexual assault in the fourth degree. It was discretionary whether or not to sever under Rule 22.2(b)(i). White v. State, 370 Ark. 284, 259 S.W.3d 410 (2007).

5-14-128. Registered offender living near school, public park, youth center, or daycare prohibited.

(a) It is unlawful for a sex offender who is required to register under the Sex Offender Registration Act of 1997, § 12-12-901 et seq., and who has been assessed as a Level 3 or Level 4 offender to reside within two thousand feet (2,000') of the property on which any public or private elementary or secondary school, public park, youth center, or daycare facility is located.

(b)(1) It is not a violation of this section if the property on which the sex offender resides is owned and occupied by the sex offender and was purchased prior to the date on which the public or private elementary or secondary school, public park, youth center, or daycare facility was established.

(2) The exclusion in subdivision (b)(1) of this section does not apply to a sex offender who pleads guilty or nolo contendere to or is found guilty of another sex offense after the public or private elementary or secondary school, public park, youth center, or daycare facility is established.

(c)(1)(A) With respect to a public or private elementary or secondary school or a daycare facility, it is not a violation of this section if the sex offender resides on property he or she owns prior to July 16, 2003.

(B) With respect to a public park or youth center, it is not a violation of this section if the sex offender resides on property he or she owns prior to July 31, 2007.

(2)(A) The exclusion in subdivision (c)(1)(A) of this section does not apply to a sex offender who pleads guilty or nolo contendere to or is found guilty of another sex offense after July 16, 2003.

(B) The exclusion in subdivision (c)(1)(B) of this section does not apply to a sex offender who pleads guilty or nolo contendere to or is found guilty of another sex offense on or after July 31, 2007.

(d) A sex offender who is required to register under the Sex Offender Registration Act of 1997, § 12-12-901 et seq., and who knowingly violates a provision of this section is guilty of a Class D felony.

(e)(1) A person who is charged with violating this section shall be ordered as a condition of his or her release from custody not to return to the location where he or she was residing that was located within two thousand feet (2,000') of a public or private elementary or secondary school, public park, youth center, or daycare facility until the charge is adjudicated.

(2) The court having jurisdiction over the charge may order that the defendant be allowed to return to his or her residence before the adjudication of the charge if good cause is shown.

(f) As used in this section:

(1) "Public park" means any property owned or maintained by this state or a county, city, or town in this state for the recreational use of the public; and

(2) "Youth center" means any building, structure, or facility owned or operated by a not-for-profit organization or by this state or a county, city, or town in this state for use by minors to promote the health, safety, or general welfare of the minors.

History. Acts 2003, No. 330, § 3; 2007, No. 818, § 1; 2009, No. 1406, § 1.

Amendments. The 2007 amendment inserted "public park, youth center" in (a) and (b); in (c), inserted "With respect to a public or private elementary or secondary school or a daycare facility" in present (1)(A), added (1)(B), substituted "subdivi-

sion (c)(1)(A)" for "subsection (c)(1)" in present (2)(A), and added (2)(B); added (e); and made related and stylistic changes.

The 2009 amendment inserted present (e) and redesignated (e) as (f).

RESEARCH REFERENCES

ALR. Validity, Construction, and Application of Statutory and Municipal Enactments and Conditions of Release Prohibiting Sex Offenders from Parks. 40 A.L.R.6th 419.

CASE NOTES

Analysis

Constitutionality.
Construction With Other Law.

Constitutionality.

Because this statutory plan calls for a particularized risk assessment of sex offenders, which increases the likelihood that the residency restriction is not excessive in relation to the rational purpose of minimizing the risk of sex crimes against minors, and the "rational connection" of the residency restriction is even closer to a nonpunitive purpose, this statute is not an unconstitutional ex post facto law. Weems v. Little Rock Police Dep't, 453 F.3d 1010 (8th Cir. 2006), rehearing denied, Weems v. Johnson, — F.3d —, 2006 U.S. App. LEXIS 21238 (8th Cir. Aug. 18, 2006), cert. denied, Weems v. Johnson, 550 U.S. 917, 127 S. Ct. 2128, 167 L. Ed. 2d 862 (2007).

Employing the normal rule that terms are given their ordinary and usually accepted meaning and construing "reside" to mean to dwell permanently or continuously, this section does not infringe on a constitutional right to intrastate travel. Weems v. Little Rock Police Dep't, 453 F.3d 1010 (8th Cir. 2006), rehearing denied, Weems v. Johnson, — F.3d —, 2006 U.S. App. LEXIS 21238 (8th Cir. Aug. 18, 2006), cert. denied, Weems v. Johnson, 550 U.S. 917, 127 S. Ct. 2128, 167 L. Ed. 2d 862 (2007).

Under the flexible Mathews factors, the procedural avenues afforded by the residency requirement in this section are constitutionally adequate and provide notice to offenders of the risk assessment process and a meaningful opportunity to be heard. Weems v. Little Rock Police Dep't, 453 F.3d 1010 (8th Cir. 2006), rehearing denied, Weems v. Johnson, — F.3d —, 2006 U.S. App. LEXIS 21238 (8th Cir. Aug. 18, 2006), cert. denied, Weems v. Johnson, 550 U.S. 917, 127 S. Ct. 2128, 167 L. Ed. 2d 862 (2007).

This section, which prohibits registered high risk sex offenders from living within 2,000 feet of a school or daycare center, was rationally related to the state's legitimate interest in protecting children from the most dangerous sex offenders and did not contravene the doctrine of substantive due process or equal protection of the laws. Weems v. Little Rock Police Dep't, 453 F.3d 1010 (8th Cir. 2006), rehearing denied, Weems v. Johnson, — F.3d —, 2006 U.S. App. LEXIS 21238 (8th Cir. Aug. 18, 2006), cert. denied, Weems v. Johnson, 550 U.S. 917, 127 S. Ct. 2128, 167 L. Ed. 2d 862 (2007).

Sex Offender Screening and Risk Assessment Committee's use of statements the sex offender made during the assessment process, under a grant of immunity, to assess him as a level four offender, did not violate his privilege against self-incrimination under Ark. Const., Art. 2, § 8. Despite subsection (a) of this section, the Supreme Court of Arkansas held that the assessment and ultimate classification of a sex offender pursuant to the Sex Offender Registration Act are not criminal in nature; and one's privilege against self-incrimination may only be violated where one's own statements are used against one in a proceeding criminal in nature. Parkman v. Sex Offender Screening & Risk Assessment Comm., 2009 Ark. 205, 307 S.W.3d 6 (2009).

Construction With Other Law.

Definition of "residency" for purposes of registration in § 12-12-903(10)(B) appears in a different chapter of the Arkansas Code than the residency restriction in subsection (a) of this section, and the

definition does not by its terms apply to the criminal statute that makes it unlawful for a sex offender "to reside" within 2000 feet of a school or daycare facility. Weems v. Little Rock Police Dep't, 453 F.3d 1010 (8th Cir. 2006), rehearing denied, Weems v. Johnson, — F.3d —, 2006 U.S. App. LEXIS 21238 (8th Cir. Aug. 18, 2006), cert. denied, Weems v. Johnson, 550 U.S. 917, 127 S. Ct. 2128, 167 L. Ed. 2d 862 (2007).

5-14-129. Registered offender working with children prohibited.

(a) It is unlawful for a sex offender who is required to register under the Sex Offender Registration Act of 1997, § 12-12-901 et seq., and who has been assessed as a Level 3 or Level 4 offender to knowingly:

(1) Engage in an occupation or participate in a volunteer position that requires the sex offender to work or interact primarily and directly with a child under sixteen (16) years of age; or

(2) Accept work as a self-employed person, an independent contractor, or an employee or agent of a self-employed person or independent contractor that is to be performed at a private daycare facility when the privately owned daycare facility has in its care a child.

(b) A sex offender who is required to register under the Sex Offender Registration Act of 1997, § 12-12-901 et seq., and who knowingly violates this section is guilty of a Class D felony.

History. Acts 2005, No. 1779, § 1; 2011, No. 1023, § 1.

Amendments. The 2011 amendment added (a)(2); and added "knowingly" at the end of the introductory language of (a).

CASE NOTES

Interpretation.

Sex Offender Screening and Risk Assessment Committee's use of statements the sex offender made during the assessment process, under a grant of immunity, to assess him as a level four offender, did not violate his privilege against self-incrimination under Ark. Const., Art. 2, § 8. Despite subsection (a) of this section, the Supreme Court of Arkansas held that the assessment and ultimate classification of a sex offender pursuant to the Sex Offender Registration Act are not criminal in nature; and one's privilege against self-incrimination may only be violated where one's own statements are used against one in a proceeding criminal in nature. Parkman v. Sex Offender Screening & Risk Assessment Comm., 2009 Ark. 205, 307 S.W.3d 6 (2009).

Circuit court's finding that defendant failed to comply as a sex offender under subsection (a) of this section because defendant worked at a daycare was against the preponderance of the evidence, as evidence demonstrated that defendant's work at the daycare was carpentry work that was in no way work or interaction with children under 16. Newman v. State, 2011 Ark. 112, — S.W.3d — (2011).

5-14-130. Registered offender — Incorrect permanent physical address on identification cards or driver's license prohibited.

(a) It is unlawful for a person who is required to register under the Sex Offender Registration Act of 1997, § 12-12-901 et seq., or required to register as a sex offender in any other state to knowingly:

(1) Provide false information to obtain an identification card or a driver's license under Title 27 of this Arkansas Code that indicates an incorrect permanent physical address for his or her residence; or

(2) Possess an identification card or a driver's license issued under Title 27 of this Arkansas Code that indicates an incorrect permanent physical address for his or her residence.

(b) It is an affirmative defense to a violation of subdivision (a)(2) of this section if the sex offender has provided notice of a change of address as required by § 27-16-506.

(c)(1) A violation of subdivision (a)(1) of this section is a Class D felony.

(2) A violation of subdivision (a)(2) of this section is a Class A misdemeanor.

History. Acts 2007, No. 392, § 1.

5-14-131. Registered offender living near victim or having contact with victim prohibited.

(a) As used in this section, "victim" means a victim of a sex offense for which a person is required to register as a sex offender under the Sex Offender Registration Act of 1997, § 12-12-901 et seq.

(b) It is unlawful for a person who is required to register under the Sex Offender Registration Act of 1997, § 12-12-901 et seq., and who has been assessed as a Level 3 or Level 4 offender to knowingly:

(1) Reside within two thousand feet (2,000') of the residence of his or her victim; or

(2) Have direct or indirect contact with his or her victim for the purpose of harassment under § 5-71-208.

(c)(1) It is an affirmative defense to a prosecution for a violation of subdivision (b)(1) of this section if the property where the sex offender resides is owned and occupied by the sex offender and was purchased prior to the date on which his or her victim began residing within two thousand feet (2,000') of the residence of the sex offender.

(2) The affirmative defense in subdivision (c)(1) of this section is not available to a sex offender who pleads guilty or nolo contendere to or is found guilty of another sex offense involving his or her victim after his or her victim began residing within two thousand feet (2,000') of the residence of the sex offender.

(d)(1) It is an affirmative defense to a prosecution for a violation of subdivision (b)(1) of this section if the sex offender resides on property he or she owned prior to March 21, 2007.

(2) The affirmative defense in subdivision (d)(1) of this section is not available to a sex offender who pleads guilty or nolo contendere to or is found guilty of another sex offense involving his or her victim after March 21, 2007.

(e) Upon conviction, a person who violates this section is guilty of a Class D felony.

History. Acts 2007, No. 394, § 1.

CASE NOTES

Interpretation.

Sex Offender Screening and Risk Assessment Committee's use of statements the sex offender made during the assessment process, under a grant of immunity, to assess him as a level four offender, did not violate his privilege against self-incrimination under Ark. Const., Art. 2, § 8. Despite subdivision (b)(1) of this section, the Supreme Court of Arkansas held that the assessment and ultimate classification of a sex offender pursuant to the Sex Offender Registration Act are not criminal in nature; and one's privilege against self-incrimination may only be violated where one's own statements are used against one in a proceeding criminal in nature. Parkman v. Sex Offender Screening & Risk Assessment Comm., 2009 Ark. 205, 307 S.W.3d 6 (2009).

5-14-132. Registered offender prohibited from entering upon school campus — Exception.

(a) As used in this section:

(1) "Campus" means the real property, a building, or any other improvement in this state owned, leased, rented, or controlled by or for the operation of a public school; and

(2) "Public school" means any school in this state that is:

(A) A public school operated by a public school district;

(B) A charter school established under the Public School Funding Act of 2003, § 6-20-2301 et seq.;

(C) A state-funded prekindergarten program operated by a public school or an education service cooperative;

(D) The Arkansas School for the Blind;

(E) The Arkansas School for the Deaf;

(F) The Arkansas School for Mathematics, Sciences, and the Arts;

(G) An educational facility of the Division of Youth Services of the Department of Human Services or contracting with the Division of Youth Services; or

(H) An educational facility of the Division of Developmental Disabilities Services of the Department of Human Services.

(b) It is unlawful for a sex offender who is required to register under the Sex Offender Registration Act of 1997, § 12-12-901 et seq., and who has been assessed as a Level 3 or Level 4 offender to knowingly enter upon the campus of a public school.

(c) It is not a violation of this section if the sex offender:

(1) Is less than twenty-two (22) years of age and is a student enrolled in a grade kindergarten through twelve (K-12) program;

(2) Enters upon the campus for the purpose of attending a school-sponsored event for which an admission fee is charged or tickets are sold or distributed, a graduation ceremony, or a baccalaureate ceremony;

(3) Enters upon the campus on a day that is not designated a student contact day by the public school's calendar or on a day in which no school-sponsored event is taking place upon the campus; or

(4) Is the parent or guardian of a student enrolled in a public school and enters upon the campus where the student is enrolled for the purpose of:

(A) Delivering to the student medicine, food, or personal items if the medicine, food, or personal items are delivered directly to the public school's office; or

(B) Attending a scheduled parent-teacher conference if the sex offender is escorted to and from the scheduled parent-teacher conference by a designated public school official or employee.

(d)(1) A sex offender who is the parent or guardian of a student enrolled in a public school and wishes to enter upon the campus where the student is enrolled for any other purpose shall give reasonable notice to the public school principal or his or her designee.

(2)(A) The public school principal or his or her designee may allow the parent or guardian sex offender to enter upon the campus so long as there is a designated public school official or employee available to escort and supervise the parent or guardian sex offender while he or she remains on campus.

(B) If a designated public school official or employee is not available at the time the parent or guardian sex offender wishes to enter upon the campus, the parent or guardian sex offender shall not enter upon the campus until he or she is notified that a designated public school official or employee is available.

(e) Upon conviction, any sex offender who violates this section is guilty of a Class D felony.

History. Acts 2007, No. 992, § 1; 2009, No. 748, § 15.

Amendments. The 2009 amendment, in (c)(1), substituted "Less than twenty-two (22) years of age" for "a minor" and inserted "enrolled in a grade kindergarten through twelve (K-12) program"; and made changes throughout (c) and (d).

CASE NOTES

Interpretation.

Sex Offender Screening and Risk Assessment Committee's use of statements the sex offender made during the assessment process, under a grant of immunity, to assess him as a level four offender, did not violate his privilege against self-incrimination under Ark. Const., Art. 2, § 8. Despite subsection (b) of this section, the Supreme Court of Arkansas held that the assessment and ultimate classification of a sex offender pursuant to the Sex Offender Registration Act are not criminal in nature; and one's privilege against self-incrimination may only be violated where one's own statements are used against one in a proceeding criminal in nature. Parkman v. Sex Offender Screening & Risk Assessment Comm., 2009 Ark. 205, 307 S.W.3d 6 (2009).

5-14-133. Registered offender prohibited from entering a water park owned or operated by a local government.

(a) As used in this section, "water park" means a recreational facility that has among its features a swimming pool and is open to the general public.

(b) It is unlawful for a person who is required to register under the Sex Offender Registration Act of 1997, § 12-12-901 et seq., and who has been assessed as a Level 3 or Level 4 offender to knowingly enter a water park owned or operated by a local government.

(c) A violation of this section is a Class D felony.

History. Acts 2011, No. 816, § 1.

Subchapter 2 — Medical Records of Persons Charged with Sex Crimes

5-14-202. Access by prosecutors to medical records of persons charged with sex crimes — Victim notification of health risk.

(a)(1) Through a warrant issued by a judicial officer under Rule 13 of the Arkansas Rules of Criminal Procedure, a prosecuting attorney of this state is entitled access to a relevant medical record of a person charged with having committed a sex crime against another person, which act could have exposed the victim to a disease carried by the alleged offender.

(2)(A) An application by a prosecuting attorney for a relevant medical record shall describe with particularity the person whose relevant medical record is to be obtained and shall be supported by one (1) or more affidavits or recorded testimony before a judicial officer particularly setting forth the facts and circumstances tending to show that the person may present a danger to the health of a victim of a sex crime.

(B) If the judicial officer finds that the application meets the requirements of subdivision (a)(2)(A) of this section and that, on the basis of the proceeding before the judicial officer, there is reasonable cause to believe that the relevant medical record should be disclosed, the judicial officer shall issue a warrant directing disclosure of the medical record to the prosecuting attorney.

(b) Upon service of a warrant, a person having custody of a relevant medical record shall grant access to the prosecuting attorney and is not subject to any liability for granting the access.

(c)(1) If a prosecuting attorney after reviewing a medical record determines that a victim is subject to a health risk as a result of a sex crime, the prosecuting attorney may convey that health risk information to the victim, and the prosecuting attorney is not subject to any liability for disclosing that health risk information to the victim.

(2)(A) The prosecuting attorney may disclose the health risk information to the victim only.

(B) However, if the victim is a minor or is mentally incompetent, then the prosecuting attorney may disclose the health risk information to the victim's parent or legal guardian only.

(d) For medical records of testing done under § 12-12-107, the prosecuting attorney shall:

(1) Be notified of any human immunodeficiency virus (HIV) testing done under § 12-12-107;

(2) Be given a copy of the results of the human immunodeficiency virus (HIV) test; and

(3) Notify the victim, his or her parent or parents or guardian if the victim is a minor, and the defendant of the results of the human immunodeficiency virus (HIV) test as soon as is practicable.

(e) The prosecuting attorney is not subject to any liability to the victim for failing to obtain a medical record or failing to disclose health risk information to the victim.

(f) This subchapter does not repeal or supersede any rule of evidence or rule of criminal procedure that would allow the admissibility of a medical record as evidence in a criminal proceeding.

History. Acts 2001, No. 1709, § 2; 2011, No. 1186, § 1.

A.C.R.C. Notes. The reference to § 12-12-107 in subsection (d) of this section is not a reference to the currently codified § 12-12-107 created by Acts 2011, No. 1004, § 1, and concerning adult abuse and domestic violence reporting. It is a reference to a § 12-12-107 that was in a Section 2 of House Bill 2056 from the 2011 regular session. As introduced, House Bill 2056 contained a Section 1 amending this section, and a Section 2 creating a new § 12-12-107. That § 12-12-107 would have required HIV testing for defendants charged with certain sex offenses. However, Section 2 of House Bill 2056 was deleted by an amendment in the Senate, but the references to § 12-12-107 in Section 1 were not amended out. The amended version of House Bill 2056 became Acts 2011, No. 1186.

Amendments. The 2011 amendment inserted present (d) and redesignated the remaining subsections accordingly.

CHAPTER 16

VOYEURISM OFFENSES

SECTION.

5-16-101. Crime of video voyeurism.

(a) It is unlawful to use any camera, videotape, photo-optical, photoelectric, or any other image recording device for the purpose of secretly observing, viewing, photographing, filming, or videotaping a person present in a residence, place of business, school, or other structure, or any room or particular location within that structure, if that person:

(1) Is in a private area out of public view;

(2) Has a reasonable expectation of privacy; and

(3) Has not consented to the observation.

(b) It is unlawful to knowingly use a camcorder, motion picture camera, photographic camera of any type, or other equipment that is concealed or disguised to secretly or surreptitiously videotape, film, photograph, record, or view by electronic means a person:

(1) For the purpose of viewing any portion of the person's body that is covered with clothing and for which the person has a reasonable expectation of privacy;

(2) Without the knowledge or consent of the person being videotaped, filmed, photographed, recorded, or viewed by electronic means; and

(3) Under circumstances in which the person being videotaped, filmed, photographed, recorded, or viewed by electronic means has a reasonable expectation of privacy.

(c)(1) A violation of subsection (a) of this section is a Class D felony.

(2)(A) A violation of subsection (b) of this section is a Class B misdemeanor.

(B) However, a violation of subsection (b) of this section is a Class A misdemeanor if:

(i) The person who created the video recording, film, or photo obtained as described in subsection (b) distributed or transmitted it to another person; or

(ii) The person who created the video recording, film, or photo obtained as described in subsection (b) posted it in a format accessible by another person via the Internet.

(d) The provisions of this section do not apply to any of the following:

(1) Video recording or monitoring conducted under a court order from a court of competent jurisdiction;

(2) Security monitoring operated by or at the direction of an occupant of a residence;

(3) Security monitoring operated by or at the direction of the owner or administrator of a place of business, school, or other structure;

(4) Security monitoring operated in a motor vehicle used for public transit;

(5) Security monitoring and observation associated with a correctional facility, regardless of the location of the monitoring equipment;

(6) Video recording or monitoring conducted by a law enforcement officer within the official scope of his or her duty; or

(7) Videotaping under § 12-18-615(b).

History. Acts 1999, No. 757, § 1; 2001, No. 532, § 1; 2007, No. 187, § 1; 2009, No. 330, § 1; 2009, No. 758, § 5.

A.C.R.C. Notes. Acts 2009, No. 758, § 29, provided: "Contingent Effectiveness. This act shall not become effective unless an act of the Eighty-Seventh General Assembly repealing the Arkansas Child Maltreatment Act, § 12-12-501 et seq., and enacting a new Child Maltreatment Act, § 12-18-101 et seq., becomes effective." The contingency in Acts 2009, No. 758, § 29, was met by Acts 2009, No. 749.

Amendments. The 2007 amendment inserted present (b) and (c)(2), and redesignated the remaining subdivisions accordingly; and in present (c)(1), inserted "subsection (a) of."

The 2009 amendment by No. 330, in (c)(2), inserted (c)(2)(B) and redesignated the remaining text accordingly.

The 2009 amendment by No. 758 made a minor stylistic change in (d)(1), and

substituted "under § 12-18-615(b)" for "pursuant to § 12-12-508(b)" in (d)(7).

5-16-102. Voyeurism.

(a) As used in this section:

(1) "Nude or partially nude" means any person who has less than a fully opaque covering over the genitals, pubic area, buttocks, or breast of a female;

(2) "Private place" means a place where a person may reasonably expect to be safe from being observed without his or her knowledge and consent; and

(3) "Public accommodation" means a business, accommodation, refreshment, entertainment, recreation, or transportation facility where a good, service, facility, privilege, advantage, or accommodation is offered, sold, or otherwise made available to the public.

(b) A person commits the offense of voyeurism if for the purpose of sexual arousal or gratification, he or she knowingly:

(1) Without the consent of each person who is present in the private place, looks into a private place that is, or is part of, a public accommodation and in which a person may reasonably be expected to be nude or partially nude; or

(2) Enters another person's private property without the other person's consent and looks into any person's dwelling unit if all of the following apply:

(A) The person looks into the dwelling with the intent to intrude upon or interfere with a person's privacy;

(B) The person looks into a part of the dwelling in which an individual is present;

(C) The individual present has a reasonable expectation of privacy in that part of the dwelling; and

(D) The individual present does not consent to the person's looking into that part of the dwelling.

(c)(1) Except as provided in subdivision (c)(2) of this section, a violation of this section is a Class A misdemeanor.

(2) A violation of this section is a Class D felony if:

(A) A victim is under seventeen (17) years of age; and

(B) The person who commits the offense holds a position of trust or authority over the victim.

History. Acts 2005, No. 1642, § 1; 2007, No. 187, § 2.

Amendments. The 2007 amendment added "or breast of a female" in (a)(1), and made related changes.

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Survey of Legislation, 2005 Arkansas General Assembly, Criminal Law, 28 U. Ark. Little Rock L. Rev. 335.

SUBTITLE 3. OFFENSES INVOLVING FAMILIES, DEPENDENTS, ETC.

CHAPTER 26

OFFENSES INVOLVING THE FAMILY

SUBCHAPTER.

Subchapter 3 — Domestic Battering and Assault

SECTION.

5-26-302. Definitions.

CASE NOTES

Analysis

Applicability.

Defendant cited neither argument nor convincing authority to show why an adulterous relationship did not come under the purview of a statute intended to curb domestic violence, where the legislature expressly included in subdivision (1)(A) of this section of a broad definition of "family or household member" to include "dating relationships" based on three factors, including "type;" defendant's relationship with the victim was a romantic one that lasted several months, and it could be a romantic or intimate social relationship under subdivision (1)(A) of this section; the testimony was sufficient to show that defendant and the victim had numerous romantic and intimate interactions of various types for a sufficient length of time to support a finding that there was a "dating relationship" under the statute. Fuller v. State, 99 Ark. App. 264, 259 S.W.3d 486 (2007).

Defendant's conviction for second-degree domestic battery by stabbing a family or household member, in violation of § 5-26-304(a)(2), was upheld where there was substantial evidence that the victim was a household member, as defined in subdivision (2)(F) of this section; defendant stated that defendant recognized the knife with which the victim was stabbed because defendant "lived there" and "used it, cooked with it, every day." Delamar v. State, 101 Ark. App. 313, 276 S.W.3d 746 (2008).

Dating Relationship.

When defendant stabbed the victim after she arrived home to her apartment, the evidence was sufficient to support his conviction for domestic battery in the first degree in violation of § 5-26-303(a)(1); the trial court did not err by denying his motion for a directed verdict. The state did prove that he and the victim were involved in a "dating relationship" pursuant to subdivision (1)(A) of this section; they had been talking for several months, having sexual relations, and defendant constantly accused the victim of being with other men. Webster v. State, 2009 Ark. App. 579, — S.W.3d — (2009).

5-26-303. Domestic battering in the first degree.

(a) A person commits domestic battering in the first degree if:

(1) With the purpose of causing serious physical injury to a family or household member, the person causes serious physical injury to a family or household member by means of a deadly weapon;

(2) With the purpose of seriously and permanently disfiguring a family or household member or of destroying, amputating, or permanently disabling a member or organ of a family or household member's body, the person causes such an injury to a family or household member;

(3) The person causes serious physical injury to a family or household member under circumstances manifesting extreme indifference to the value of human life;

(4) The person knowingly causes serious physical injury to a family or household member he or she knows to be sixty (60) years of age or older or twelve (12) years of age or younger; or

(5) The person:

(A) Commits any act of domestic battering as defined in § 5-26-304 or § 5-26-305; and

(B) For conduct that occurred within the ten (10) years preceding the commission of the current offense, the person has on two (2) previous occasions been convicted of any act of battery against a family or household member as defined by the laws of this state or by the equivalent laws of any other state or foreign jurisdiction.

(b)(1) Domestic battering in the first degree is a Class B felony.

(2) However, domestic battering in the first degree is a Class A felony upon a conviction pursuant to subsection (a) of this section if:

(A) Committed against a woman the person knew or should have known was pregnant;

(B) For conduct that occurred within the five (5) years preceding the commission of the current offense, the person has been convicted of a prior offense of:

(i) Domestic battering in the first degree;

(ii) Domestic battering in the second degree, § 5-26-304;

(iii) Domestic battering in the third degree, § 5-26-305; or

(iv) An equivalent penal law of this state or of another state or foreign jurisdiction.

History. Acts 1979, No. 396, § 1; A.S.A. 1947, § 41-1653; Acts 1995, No. 1291, § 1; 1999, No. 1317, § 2; 1999, No. 1365, § 1; 2001, No. 1553, § 8; 2003, No. 944, § 1; 2003, No. 1079, § 1; 2005, No. 1994, § 481; 2007, No. 671, § 1; 2009, No. 194, § 1; 2009, No. 748, § 16; 2011, No. 1120, § 7.

A.C.R.C. Notes. The amendment to present subdivision (a)(5) of this section by Acts 2009, No. 748, § 16, is partially superseded by Acts 2009, No. 194, § 1, pursuant to Acts 2009, No. 748, § 45.

Amendments. The 2007 amendment added (a)(4) and made related changes.

The 2009 amendment by No. 194 inserted (a)(4), redesignated the following subdivision accordingly, and substituted "(a)(1)-(4)" for "(a)(1) – (a)(3)" in present (a)(5)(A).

The 2009 amendment by No. 748 subdivided present (a)(5), and made related and minor stylistic changes.

The 2011 amendment deleted "subdivisions (a)(1)–(4) of this section" following "as defined in" in (a)(5)(A).

CASE NOTES

Evidence Sufficient.

Evidence was sufficient to show that defendant acted "under circumstances manifesting extreme indifference to the value of human life" and to sustain his conviction for first degree battery because defendant admittedly placed a child in a tub of water so hot that it severed the skin from his feet, and defendant's own statements, although inconsistent, supported the conclusion that he knew that it was his responsibility to properly supervise the child during a bath and to ensure a safe water temperature and that he consciously disregarded the risks involved. Bell v. State, 99 Ark. App. 300, 259 S.W.3d 472 (2007).

When defendant stabbed the victim after she arrived home to her apartment, the evidence was sufficient to support his conviction for domestic battery in the first degree in violation of subdivision (a)(1) of this section; the trial court did not err by denying his motion for a directed verdict. The state did prove that he and the victim were involved in a "dating relationship" pursuant to § 5-26-302(1)(A); they had been talking for several months, having sexual relations, and defendant constantly accused the victim of being with other men. Webster v. State, 2009 Ark. App. 579, — S.W.3d — (2009).

5-26-304. Domestic battering in the second degree.

(a) A person commits domestic battering in the second degree if:

(1) With the purpose of causing physical injury to a family or household member, the person causes serious physical injury to a family or household member;

(2) With the purpose of causing physical injury to a family or household member, the person causes physical injury to a family or household member by means of a deadly weapon;

(3) The person recklessly causes serious physical injury to a family or household member by means of a deadly weapon; or

(4) The person knowingly causes physical injury to a family or household member he or she knows to be sixty (60) years of age or older or twelve (12) years of age or younger.

(b)(1) Domestic battering in the second degree is a Class C felony.

(2) However, domestic battering in the second degree is a Class B felony if:

(A) Committed against a woman the person knew or should have known was pregnant;

(B) For conduct that occurred within the five (5) years preceding the commission of the current offense, the person has been convicted of a prior offense of:

(i) Domestic battering in the first degree, § 5-26-303;

(ii) Domestic battering in the second degree;

(iii) Domestic battering in the third degree, § 5-26-305; or

(iv) An equivalent penal law of this state or of another state or foreign jurisdiction; or

(C) For conduct that occurred within the ten (10) years preceding the commission of the current offense, the person has on two (2)

previous occasions been convicted of any act of battery against a family or household member as defined by a law of this state or by an equivalent law of any other state or foreign jurisdiction.

History. Acts 1979, No. 396, § 2; A.S.A. 1947, § 41-1654; Acts 1995, No. 1291, § 2; 1999, No. 1365, § 2; 2001, No. 1553, § 9; 2003, No. 944, § 2; 2003, No. 1079, § 1; 2005, No. 1994, § 481; 2009, No. 194, § 2.

Amendments. The 2009 amendment added (a)(4) and made related changes.

CASE NOTES

Evidence.

Defendant's conviction for second-degree domestic battery by stabbing a family or household member, in violation of subdivision (a)(2) of this section, was upheld where there was substantial evidence that the victim was a household member, as defined in § 5-26-302(2)(F); defendant stated that defendant recognized the knife with which the victim was stabbed because defendant "lived there" and "used it, cooked with it, every day." Delamar v. State, 101 Ark. App. 313, 276 S.W.3d 746 (2008).

When defendant's infant son was taken to the emergency room, the treating physician found that his broken femur was indicative of child abuse; the infant had fourteen broken rib bones in various stages of healing. Defendant admitted that he would sometimes get mad and squeeze his son; defendant was convicted of three counts of battery in the second degree in violation of this section and one count of battery in the first degree under § 5-13-201(a)(7). Davis v. State, 2009 Ark. App. 573, — S.W.3d — (2009).

Defendant's conviction for domestic battering under subdivision (a)(2) of this section was supported by sufficient evidence because the state showed that, with the purpose of causing physical injury, defendant caused injury to the victim, his brother, by means of a deadly weapon. While defendant contended that he was acting in self-defense when he struck the victim with a sickle, the testimony of the victim and the victim's brother established that the victim did not have the gun that he had when police arrived until after defendant had battered both the victim and the victim's brother. Brown v. State, 2011 Ark. App. 150, — S.W.3d — (2011).

5-26-305. Domestic battering in the third degree.

(a) A person commits domestic battering in the third degree if:

(1) With the purpose of causing physical injury to a family or household member, the person causes physical injury to a family or household member;

(2) The person recklessly causes physical injury to a family or household member;

(3) The person negligently causes physical injury to a family or household member by means of a deadly weapon; or

(4) The person purposely causes stupor, unconsciousness, or physical or mental impairment or injury to a family or household member by administering to the family or household member, without the family or household member's consent, any drug or other substance.

(b)(1) Domestic battering in the third degree is a Class A misdemeanor.

(2) However, domestic battering in the third degree is a Class D felony if:

(A) Committed against a woman the person knew or should have known was pregnant;

(B) For conduct that occurred within the five (5) years preceding the commission of the current offense, the person has been convicted of a prior offense of:

(i) Domestic battering in the first degree, § 5-26-303;

(ii) Domestic battering in the second degree, § 5-26-304;

(iii) Domestic battering in the third degree;

(iv) Aggravated assault on a family or household member, § 5-26-306; or

(v) An equivalent penal law of this state or of another state or foreign jurisdiction; or

(C) For conduct that occurred within the ten (10) years preceding the commission of the current offense, the person has on two (2) previous occasions been convicted of any act of battery against a family or household member as defined by a law of this state or by an equivalent law of any other state or foreign jurisdiction.

History. Acts 1979, No. 396, § 3; A.S.A. 1947, § 41-1655; Acts 1995, No. 1291, § 3; 1999, No. 1365, § 3; 2001, No. 1553, § 10; 2003, No. 944, § 3; 2003, No. 1079, § 1; 2005, No. 1994, § 481; 2009, No. 333, § 1.

Amendments. The 2009 amendment, in (b)(2)(B), inserted (b)(2)(B)(iv), redesignated the subsequent subdivision accordingly, and made related changes.

CASE NOTES

ANALYSIS

Evidence.
Force.

Evidence.

State produced evidence in the form of a witness that defendant pushed the victim from a moving vehicle and that he struck her afterwards as she lay on the ground; by pushing the victim from a moving vehicle and then kicking her, defendant consciously disregarded the risk that his actions would cause injury to the victim, and there was substantial evidence to support a finding that defendant recklessly caused physical injury to the victim. Lasker v. State, 2009 Ark. App. 591, — S.W.3d — (2009).

Defendant's suspended sentence was properly revoked under § 5-4-309(d) where the state proved that defendant committed third-degree domestic battery under subsection (a) of this section by showing that defendant inflicted physical injury under § 5-1-102(14), by pulling his wife's hair and throwing her against a vehicle. Andrews v. State, 2009 Ark. App. 624, — S.W.3d — (2009).

During a hearing on the state's petition to revoke a defendant's suspended sentence, defendant admitted that he slapped his pregnant wife and a responding officer testified to a personal observation of the wife's injuries; this evidence was sufficient to find that defendant inexcusably violated a condition of that suspension and that defendant had committed the offense of domestic battery in the third degree. May v. State, 2009 Ark. App. 703, — S.W.3d — (2009).

Pregnant wife's testimony that appellant pushed and threatened her — causing red marks on her neck and arm — was sufficient to prove by a preponderance that appellant violated the conditions of his suspended sentence by committing the criminal offenses of domestic battery in third degree, pursuant to subdivision (b)(2)(A) of this section, and terroristic threatening in the second degree, under § 5-13-301(b)(1). Autrand v. State, 2010 Ark. App. 245, — S.W.3d — (2010).

Because a juvenile's father had not resorted to use of a deadly weapon during an argument, because there had been an interlude of approximately five minutes

since their last confrontation, because the father, at the time he was struck, had turned away from the juvenile, and because the juvenile did not testify as to whether the juvenile's beliefs were reasonable, the juvenile lacked justification under §§ 5-1-102(18), 5-2-606(a)(1), 5-2-607(a)(1), (2), and was properly adjudicated as a delinquent for second-degree domestic battering. D.W. v. State, 2011 Ark. App. 187, — S.W.3d — (2011).

Force.

In a case alleging rape, kidnapping, and third-degree domestic battery, a sufficiency of the evidence argument was not preserved for review because defendant argued on the first time on appeal that the amount of restraint or force used did not warrant a kidnapping conviction and a third-degree battery conviction in addition to the rape. This was not the same argument raised during a directed verdict motion. Rounsaville v. State, 372 Ark. 252, 273 S.W.3d 486 (2008).

5-26-306. Aggravated assault on a family or household member.

CASE NOTES

Evidence.

Evidence was sufficient to sustain defendant's conviction for aggravated assault and aggravated assault on a family member when, among other things, evidence showed that defendant drove a car in an attempt to run over the victim, the father of her child, and his girlfriend. Williams v. State, 96 Ark. App. 277, 241 S.W.3d 290 (2006).

5-26-313. Notice.

A person who is convicted of any misdemeanor of domestic violence shall be notified by the court that it is unlawful for the person to ship, transport, or possess a firearm or ammunition pursuant to 18 U.S.C. § 922(g)(8) and (9), as it existed on January 1, 2007.

History. Acts 2007, No. 676, § 1.

Subchapter 4 — Nonsupport

SECTION.

5-26-401. Nonsupport.

(a) A person commits the offense of nonsupport if he or she fails to provide support to the person's:

(1) Spouse who is physically or mentally infirm or financially dependent;

(2) Legitimate child who is less than eighteen (18) years of age;

(3) Illegitimate child who is less than eighteen (18) years of age and whose parentage has been determined in a previous judicial proceeding; or

(4) Dependent child who is physically or mentally infirm.

(b)(1) Nonsupport is a Class A misdemeanor.

(2) However, nonsupport is a:

(A) Class D felony if the person:

(i) Leaves or remains outside the State of Arkansas for more than thirty (30) days while a current duty of support is unpaid. However, it is an affirmative defense to a charge under this subdivision (b)(2)(A)(i) that the defendant did not leave or remain outside the state with the purpose of avoiding the payment of support;

(ii) Has previously been convicted of nonsupport; or

(iii) Owes more than two thousand five hundred dollars ($2,500) in past-due child support, pursuant to a court order or by operation of law, and the amount represents at least four (4) months of past-due child support;

(B) Class C felony if the person owes more than ten thousand dollars ($10,000) but less than twenty-five thousand dollars ($25,000) in past-due child support, pursuant to a court order or by operation of law; or

(C) Class B felony if the person owes more than twenty-five thousand dollars ($25,000) in past-due child support, pursuant to a court order or by operation of law.

(c) The court may direct that a fine imposed upon conviction of nonsupport or a bond forfeited in connection with a prosecution for nonsupport be paid for the support and maintenance of the person entitled to support.

(d) A district court located in a county having a population in excess of two hundred thousand (200,000) inhabitants shall cause a warrant of arrest to be issued upon affidavit of a spouse or any person who is responsible for maintenance of a dependent child that states that nonsupport has taken place.

(e) Any person found guilty of nonsupport is also responsible for the court costs and administrative costs incurred by the court.

(f) The state may take judgment against any defendant convicted of nonsupport for any money expended by any state agency for the support and maintenance of the person with respect to whom the defendant had a duty to support.

(g) It is an affirmative defense to a prosecution under this section that the defendant had just cause to fail to provide the support.

History. Acts 1975, No. 280, § 2405; 1983, No. 174, § 1; A.S.A. 1947, § 41-2405; Acts 1997, No. 1282, § 1; 1999, No. 1484, § 1; 2007, No. 827, § 31.

Amendments. The 2007 amendment substituted "this subdivision (b)(2)(A)(i)" for "this section" in (b)(2)(A)(i).

CASE NOTES

Analysis

Continuing Crime.
Evidence.
Proof.

Continuing Crime.

Trial court erred in denying a father's motion to dismiss a charge of failure to pay child support, a continuing offense, on the ground that the statute of limitations

had expired because the date of the crime of nonsupport had to be determined based upon subdivision (b)(3) of this section, prior to its amendment in 1997; the one-year statute of limitations expired several weeks prior to the effective date of the amended version of the statute. Reeves v. State, 374 Ark. 415, 288 S.W.3d 577 (2008).

Evidence.

Trial court properly revoked defendant's suspended sentence for nonsupport, in violation of subdivision (a)(3) of this section, because defendant's purported lack of knowledge and understanding of the obligation was inconsistent with what defendant was told and what defendant admitted during the process of pleading guilty; substantial evidence supported the revocation order. Rhoades v. State, 2010 Ark. App. 730, — S.W.3d — (2010).

Proof.

Trial court erred in revoking defendant's probation for failure to pay a child support arrearage following a conviction for felony nonsupport in violation of subsection (a) and subdivision (b)(2)(B) of this section where defendant asserted an inability to pay and offered a disability as a reasonable excuse for his nonpayment and where the state offered no evidence of defendant's other sources of income, his assets, or his expenses. The trial court should have applied § 5-4-309(d)'s general inexcusably failed to comply standard as refined by § 5-4-205(f)'s restitution-specific factors. Hanna v. Arkansas, 2009 Ark. App. 809, — S.W.3d — (2009), review denied, Hanna v. State, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 93 (Feb. 12, 2010).

5-26-415. Times when periodic payments may be authorized.

The original trial court may issue the order provided in § 5-26-414:

(1) Before the trial, with the consent of the defendant;

(2) At the trial, on entry of plea of guilty; or

(3) After conviction, in lieu of a penalty provided in § 5-26-401 or in addition to a penalty provided in § 5-26-401.

History. Acts 1951, No. 67, § 8; 1953, No. 242, § 8; A.S.A. 1947, § 41-2455; Acts 2007, No. 827, § 32.

Amendments. The 2007 amendment, in (3), twice substituted "§ 5-26-401" for "this act," and made stylistic changes.

Subchapter 5 — Custody and Visitation

SECTION.

5-26-501. Interference with visitation.

(a)(1) A person commits the offense of interference with visitation if, knowing that he or she has no lawful right to do so, he or she takes, entices, or keeps any minor from any person entitled by a court decree or order to the right of visitation with the minor.

(2) A person claiming interference with visitation shall provide a copy of the signed court order or decree regarding custody or visitation rights to a law enforcement officer as proof of the interference with visitation.

(b)(1) Interference with visitation is a Class C misdemeanor.

(2) However, interference with visitation is a:

(A) Class D felony for any offense if the minor is taken, enticed, or kept outside of the State of Arkansas; or

(B) Class A misdemeanor for a third or subsequent offense.

(c) It is an affirmative defense to a prosecution that:

(1) A person or lawful guardian committed the act to protect the minor from imminent physical harm if the defendant's:

(A) Belief that physical harm was imminent is reasonable; and

(B) Conduct in withholding visitation rights was a reasonable response to the harm believed to be imminent;

(2) A person or lawful guardian committed the act based on a reasonable belief that the person entitled to visitation would remove the minor from the jurisdiction of the court;

(3) The act was committed with the mutual consent of all parties having a right to custody and visitation of the minor; or

(4) The act was otherwise authorized by law.

History. Acts 1985, No. 540, § 1; A.S.A. 1947, § 41-2415; Acts 1999, No. 1129, § 1; 2007, No. 827, § 33.

Amendments. The 2007 amendment, rewrote (b).

CASE NOTES

Contempt.

Permanent restraining order, which authorized law-enforcement officers to arrest and incarcerate a mother for actions far beyond the statutory offense of interference with visitation, under this section, was an impermissible delegation of the circuit court's judicial power, under Ark. Const., Art. 7, § 26, to enforce its orders by finding the mother in contempt, under§ 16-10-108. Brock v. Eubanks, 102 Ark. App. 165, 288 S.W.3d 272 (2008).

5-26-503. Interference with custody.

(a) A person commits the offense of interference with custody if without lawful authority he or she knowingly takes, entices, or keeps, or aids, abets, hires, or otherwise procures another person to take, entice, or keep any minor from the custody of:

(1) The parent of the minor including an unmarried woman having legal custody of an illegitimate child under § 9-10-113;

(2) The guardian of the minor;

(3) A public agency having lawful charge of the minor; or

(4) Any other lawful custodian.

(b) Interference with custody is a Class C felony.

(c)(1) In every case prior to serving a warrant for arrest on a person charged with the offense of interference with custody, the police officer or other law enforcement officer shall inform the Department of Human Services of the circumstances of any minor named in the information or indictment as having been taken, enticed, or kept from the parent, guardian, or custodian in a manner constituting interference with custody.

(2) A representative of the department shall be present with the arresting police officer or law enforcement officer to take the minor into temporary custody of the department pending further proceedings by a court of competent jurisdiction.

(d)(1) A court of competent jurisdiction shall determine the immediate custodial placement of any minor taken into custody by the department under subsection (c) of this section pursuant to a petition brought by the department to determine if there is probable cause to believe the minor may be:

(A) Removed from the jurisdiction of the court;

(B) Abandoned; or

(C) Outside the immediate care or supervision of a person lawfully entitled to custody.

(2) The court shall immediately give custody to the lawful custodian if it finds that the lawful custodian is present before the court.

(e)(1) The department shall comply with the requirements of § 9-27-312 with regard to the giving of a notice and the setting of a hearing on a petition filed under subsection (d) of this section.

(2) The department is immune from liability with respect to any conduct undertaken pursuant to this section unless it is determined that the department acted with actual malice.

History. Acts 2007, No. 669, § 1; 2011, No. 1177, § 1.

Amendments. The 2011 amendment inserted "or keeps" and "or keep" in the introductory language of (a).

CHAPTER 27

OFFENSES AGAINST CHILDREN OR INCOMPETENTS

SUBCHAPTER.

Subchapter 2 — Offenses Generally

SECTION.

5-27-205. Endangering the welfare of a minor in the first degree.

CASE NOTES

Illustrative Cases.

Judgment convicting defendant of manufacturing methamphetamine under § 5-64-401(a)(1), possession of drug paraphernalia with the intent to manufacture methamphetamine under § 5-64-403, first-degree endangering the welfare of a minor under subdivision (a)(1) of this section, manufacturing methamphetamine in the presence of a minor, and manufacturing methamphetamine near certain facilities was affirmed because contraband was found in the kitchen and bedroom of defendant's residence, strewn about his yard, and in an outbuilding behind his residence; the materials found in the

search were the components of a methamphetamine lab; at least two of defendant's minor children were present in the residence at the time of the search; and the drug paraphernalia and chemicals found could easily be accessed by the children. Morgan v. State, 2009 Ark. 257, 308 S.W.3d 147 (2009).

Evidence that the burns to defendant's daughter were caused by a hot instrument, not hot water, which produced the risk of protracted disfigurement was sufficient to satisfy this section, the child endangerment statute. McKnight v. State, 2010 Ark. App. 598, — S.W.3d — (2010).

5-27-206. Endangering the welfare of a minor in the second degree.

CASE NOTES

Evidence Sufficient.

Evidence was sufficient to sustain convictions for endangering the welfare of a minor because defendant admitted that he forced one child to perform oral sex on him while the other child sat in the back seat, and in his statement to police officers, defendant indicated that he was aware of what he was doing and that the child was in the back seat. Bell v. State, 371 Ark. 375, 266 S.W.3d 696 (2007).

Trial court did not err in refusing to direct the verdicts where defendant took actions to conceal the harm to the child, and failed to take action to secure appropriate care for the child; the jury could conclude that defendant rubbing a substance known to cause skin irritation on the face of a toddler where Superglue had already adhered would cause, at the very least, the impairment of physical condition or a visible mark associated with the physical trauma. Price v. State, 2009 Ark. App. 664, — S.W.3d — (2009).

5-27-221. Permitting abuse of a minor.

CASE NOTES

Evidence.

Appellate court affirmed defendant's conviction under this section as there was evidence that defendant knew her son was being abused by her husband and she did nothing to prevent it. Graham v. State, 365 Ark. 274, 229 S.W.3d 30 (2006).

5-27-222. Neglect of minor resulting in delinquency.

(a) It is unlawful for a parent or person standing in loco parentis to a minor to grossly neglect a parental duty to the minor if the gross neglect:

(1) Proximately results in the delinquency of the minor; or

(2) Fails to correct the delinquency of the minor.

(b) Upon conviction, a person who violates this section is guilty of a violation and shall be punished by a fine not to exceed two hundred fifty dollars ($250).

History. Acts 1963, No. 109, § 1; A.S.A. 1947, § 41-2471; Acts 2005, No. 1994, § 44; 2007, No. 827, § 34.

Amendments. The 2007 amendment rewrote the section.

5-27-227. Providing minors with tobacco products and cigarette papers — Purchase, use, or possession prohibited — Self-service displays prohibited — Placement of tobacco vending machines.

(a)(1) It is unlawful for any person to give, barter, or sell to a minor:

(A) Tobacco in any form; or

(B) A cigarette paper.

(2) A person who pleads guilty or nolo contendere to or is found guilty of violating subdivision (a)(1) of this section is guilty of a violation and is subject to a fine not to exceed one hundred dollars ($100) per violation.

(3) An employee of an Arkansas Retail Cigarette and Tobacco permit holder who violates subdivision (a)(1) of this section is subject to a fine not to exceed one hundred dollars ($100) per violation.

(b)(1) It is unlawful for a minor to:

(A) Use or possess or to purchase, or attempt to purchase:

(i) Tobacco in any form; or

(ii) Cigarette papers; or

(B) For the purpose of obtaining or attempting to obtain tobacco in any form or cigarette papers, falsely represent himself or herself to be eighteen (18) years of age or older by displaying proof of age that is false, fraudulent, or not actually proof of the minor's age.

(2) Any cigarettes, tobacco products, or cigarette papers found in the possession of a minor may be confiscated and destroyed by a law enforcement officer.

(c)(1) It is not an offense under subsection (b) of this section if:

(A) The minor was acting at the direction of an authorized agent of the Arkansas Tobacco Control Board to enforce or ensure compliance with laws relating to the prohibition of the sale of tobacco in any form or cigarette papers to minors;

(B) The minor was acting at the direction of an authorized agent of the Office of Alcohol and Drug Abuse Prevention to compile statistical data relating to the sale of tobacco in any form or cigarette papers to minors;

(C) The minor was acting at the request of an Arkansas Retail Cigarette and Tobacco permit holder to assist the permit holder by performing a check on the permit holder's own retail business to see if the permit holder's employees would sell tobacco or cigarette papers to the minor; or

(D) The minor was acting as an agent of a retail permit holder within the scope of employment.

(2) A minor performing activities under subdivision (c)(1) of this section shall:

(A) Display the appearance of a minor;

(B) Have the written consent of the minor's parent or guardian to perform the activity on file with the agency utilizing the minor; and

(C)(i) Present a true and correct identification if asked.

(ii) Any failure on the part of a minor to provide true and correct identification upon request is a defense to any action under this section or a civil action under § 26-57-256.

(d) Any person who sells tobacco in any form or a cigarette paper has the right to deny the sale of any tobacco in any form or a cigarette paper to any person.

(e) It is unlawful for any person who has been issued a permit or a license under the Arkansas Tobacco Products Tax Act of 1977, § 26-57-201 et seq., to fail to display in a conspicuous place or on each vending machine a sign indicating that the sale of tobacco products to or purchase or possession of tobacco products by a minor is prohibited by law.

(f) It is unlawful for any manufacturer whose tobacco product is distributed in this state and any person who has been issued a permit or license under the Arkansas Tobacco Products Tax Act of 1977, § 26-57-201 et seq., to distribute a free sample of any tobacco product or coupon that entitles the holder of the coupon to any free sample of any tobacco product:

(1) In or on any public street or sidewalk within five hundred feet (500') of any playground, public school, or other facility when the playground, public school, or other facility is being used primarily by minors for recreational, educational, or other purposes; or

(2) To any minor.

(g)(1)(A) It is unlawful for any person that has been issued a permit or license under the Arkansas Tobacco Products Act of 1977, § 26-57-201 et seq., to sell or distribute a cigarette product through a self-service display.

(B) Subdivision (g)(1)(A) of this section does not apply to a:

(i) Vending machine that complies with subdivision (h)(1)(A) of this section; or

(ii) Retail tobacco store.

(2) As used in subdivision (g)(1) of this section:

(A) "Retail tobacco store" means a retail store utilized primarily for the sale of tobacco products and accessories and in which the sale of other products is merely incidental; and

(B) "Self-service display" means a display:

(i) That contains a cigarette product;

(ii) That is located in an area where customers are permitted; and

(iii) In which the cigarette product is readily accessible to a customer without the assistance of a salesperson.

(h)(1)(A) Except as provided in subdivision (h)(2) of this section, it is unlawful for any person who owns or leases a tobacco vending machine to place a tobacco vending machine in a public place.

(B) As used in subdivision (h)(1)(A) of this section, "public place" means a publicly or privately owned place to which the public or a substantial number of people have access.

(2) A tobacco vending machine may be placed in a:

(A) Restricted area within a factory, business, office, or other structure to which a member of the general public is not given access;

(B) Permitted premises that has a permit for the sale or dispensing of an alcoholic beverage for on-premises consumption that restrict entry to a person twenty-one (21) years of age or older; or

(C) Place where the tobacco vending machine is under the supervision of the owner or an employee of the owner.

(i) Any retail permit holder or license holder who violates any provision in this section is deemed guilty of a violation and subject to penalties under § 26-57-256.

(j)(1) A notice of alleged violation of this section shall be given to the holder of a retail permit or license or an agent of the holder within ten (10) days of the alleged violation.

(2)(A) The notice shall contain the date and time of the alleged violation.

(B)(i) The notice shall also include either the name of the person making the alleged sale or information reasonably necessary to determine the location in the store that allegedly made the sale.

(ii) When appropriate, information under subdivision (j)(2)(B)(i) of this section should include, but not be limited to, the:

(a) Cash register number;

(b) Physical location of the sale in the store; and

(c) If possible, the lane or aisle number.

(k) Notwithstanding the provisions of subsection (i) of this section, the court shall consider the following factors when reviewing a possible violation:

(1) The business has adopted and enforced a written policy against selling cigarettes or tobacco products to minors;

(2) The business has informed its employees of the applicable laws regarding the sale of cigarettes and tobacco products to minors;

(3) The business has required employees to verify the age of a cigarette or tobacco product customer by way of photographic identification;

(4) The business has established and imposed disciplinary sanctions for noncompliance; and

(5) That the appearance of the purchaser of the tobacco in any form or cigarette papers was such that an ordinary prudent person would believe him or her to be of legal age to make the purchase.

(l) A person convicted of violating any provision of this section whose permit or license to distribute or sell a tobacco product is suspended or revoked upon conviction shall surrender to the court any permit or license to distribute or sell a tobacco product and the court shall transmit the permit or license to distribute or sell a tobacco product to the Director of the Department of Finance and Administration and instruct the Director of Arkansas Tobacco Control:

(1) To suspend or revoke the person's permit or license to distribute or sell a tobacco product and to not renew the permit or license; and

(2) Not to issue any new permit or license to that person for the period of time determined by the court in accordance with this section.

History. Acts 1929, No. 152, § 26; Pope's Dig., § 13557; A.S.A. 1947, § 41-2465; Acts 1991, No. 543, § 1; 1997, No. 1337, § 24; 1999, No. 1591, §§ 1, 3; 2003, No. 846, § 1; 2007, No. 165, § 1; 2009, No. 748, § 17; 2009, No. 785, § 6.

A.C.R.C. Notes. The repeal of this section and the creation of a new subchapter § 5-27-701 et seq. by Acts 2009, No. 748, §§ 17 and 19, is superseded by the amendment to § 5-27-227 by Acts 2009, No. 785, § 6, pursuant to Acts 2009, No. 748, §45, and § 1-2-207(b).

Amendments. The 2007 amendment inserted "Self-service displays prohibited" in the section heading; added (h) and redesignated the following subdivisions accordingly; substituted "(i)(2)" for "(h)(2)" in present (i)(1)(A); substituted "(i)(1)(A)" for "(h)(1)(A)" in present (i)(1)(B); substituted "(j)(1)" for "(i)(1)" in present (j)(2); in present (k)(2)(B)(ii), substituted "(k)(2)(B)(i)" for "(j)(2)(B)(i)" and deleted an erroneous extra instance of "should"; and substituted "(j)" for "(i)" in present (j).

The 2009 amendment by No. 785 rewrote the section.

5-27-230. Exposing a child to a chemical substance or methamphetamine.

CASE NOTES

Evidence.

Substantial evidence demonstrated that defendant's children had been exposed to the chemicals used in the manufacture of methamphetamine, and there was sufficient evidence to support defendant's conviction of manufacturing methamphetamine; thus, defendant intended to manufacture methamphetamine and knowingly permitted her children to be exposed to methamphetamine. Holt v. State, 2009 Ark. 482, — S.W.3d — (2009).

Subchapter 3 — Arkansas Protection of Children Against Exploitation Act of 1979

Effective Dates. Acts 2007, No. 38, § 3: Jan. 30, 2007. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the current penalty classification for the offense of indecent exposure is not adequate to protect the children in this state from repeat offenders; that the Internet is being used as a tool by people that are attempting to sexually victimize children in the State of Arkansas; that the current penalty classification for the offense of Internet stalking of a child in certain situations is not adequate to protect the children in this state; and that this act is immediately necessary because of the public risk posed by sexual predators. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

5-27-302. Definitions.

As used in this subchapter:

(1) "Child" means any person under eighteen (18) years of age;

(2) "Commercial exploitation" means having monetary or other material gain as a direct or indirect goal;

(3) "Producing" means producing, directing, manufacturing, issuing, publishing, or advertising;

(4) "Sexually explicit conduct" means actual or simulated:

(A) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(B) Bestiality;

(C) Masturbation;

(D) Sadomasochistic abuse for the purpose of sexual stimulation; or

(E) Lewd exhibition of:

(i) The genitals or pubic area of any person; or

(ii) The breast of a female; and

(5) "Visual or print medium" means any film, photograph, negative, slide, book, magazine, or other visual or print medium other than material specifically used by a licensed medical professional or mental health professional, or both, for the purpose of assessment, evaluation, and treatment of a sex offender.

History. Acts 1979, No. 499, § 2; A.S.A. 1947, § 41-4202; Acts 1995, No. 1209, § 1; 2007, No. 827, § 35; 2011, No. 1190, § 1.

Amendments. The 2007 amendment substituted "medical professional or mental health professional, or both" for "medical and/or mental health professional" in (5), and made a related change.

The 2011 amendment substituted "eighteen (18)" for "seventeen (17)" in (1).

5-27-303. Engaging children in sexually explicit conduct for use in visual or print medium.

CASE NOTES

Analysis

Evidence.
Producing.

Evidence.

Trial court did not err in permitting the state to introduce videotapes depicting defendant engaged in sexual acts with his victims and with each other because the video footage was relevant to proving the elements of both the charges of rape and the charges of engaging children in the production of child pornography and because it could not be said that the video served no valid purpose other than to inflame the passions of the jury. Williams v. State, 374 Ark. 282, 287 S.W.3d 559 (2008), rehearing denied, — Ark. —, — S.W.3d —, 2008 Ark. LEXIS 589 (Oct. 30, 2008).

Where defendant was charged with numerous counts of rape and engaging children in the production of child pornography, the probative value of a DVD depicting defendant engaged in sexual contact with the young boys was not substantially outweighed by the danger of unfair prejudice because the state had the burden of proving the elements of all of the charges against defendant and because the state was entitled to prove the elements of the charges with its best evidence and the videos were certainly the

state's best evidence. Williams v. State, 374 Ark. 282, 287 S.W.3d 559 (2008), rehearing denied, — Ark. —, — S.W.3d —, 2008 Ark. LEXIS 589 (Oct. 30, 2008).

Producing.

Where defendant was convicted of engaging children in sexually explicit conduct for use in visual or print medium, counsel was not ineffective for failing to make an argument that defendant was not producing materials for "pecuniary profit" as that was no longer a required element of the charge against defendant. Smith v. State, 367 Ark. 611, 242 S.W.3d 253 (2006), rehearing denied, — Ark. —, — S.W.3d —, 2006 Ark. LEXIS 629 (Dec. 14, 2006).

5-27-305. Transportation of minors for prohibited sexual conduct.

(a) A person commits the offense of transportation of a minor for prohibited sexual conduct if the person transports, finances in whole or part the transportation of, or otherwise causes or facilitates the movement of any minor, and the actor:

(1) Knows or has reason to know that prostitution or sexually explicit conduct involving the minor will be commercially exploited by any person; and

(2) Acts with the purpose that the minor will engage in:

(A) Prostitution; or

(B) Sexually explicit conduct.

(b) Transportation of a minor for prohibited sexual conduct is a Class A felony.

History. Acts 1979, No. 499, § 5; A.S.A. 1947, § 41-4205; Acts 2007, No. 248, § 1; 2009, No. 748, § 18.

Amendments. The 2007 amendment substituted "Class A" for "Class C" in the introductory paragraph; substituted "prostitution or sexually explicit conduct involving the minor" for "prohibited sexual conduct" in (1); and substituted "Sexually explicit" for "Prohibited sexual" in (2)(B).

The 2009 amendment redesignated the introductory language as (a) and substituted "A person commits the offense of transportation of a minor for prohibited sexual conduct if the person" for "Any person is guilty of a Class A felony who"; added (b); and made minor stylistic changes.

5-27-306. Internet stalking of a child.

(a) A person commits the offense of internet stalking of a child if the person being twenty-one (21) years of age or older knowingly uses a computer online service, internet service, or local internet bulletin board service to:

(1) Seduce, solicit, lure, or entice a child fifteen (15) years of age or younger in an effort to arrange a meeting with the child for the purpose of engaging in:

(A) Sexual intercourse;

(B) Sexually explicit conduct; or

(C) Deviate sexual activity;

(2) Seduce, solicit, lure, or entice an individual that the person believes to be fifteen (15) years of age or younger in an effort to arrange a meeting with the individual for the purpose of engaging in:

(A) Sexual intercourse;

(B) Sexually explicit conduct; or

(C) Deviate sexual activity;

(3) Compile, transmit, publish, reproduce, buy, sell, receive, exchange, or disseminate the name, telephone number, electronic mail address, residence address, picture, physical description, characteristics, or any other identifying information on a child fifteen (15) years of age or younger in furtherance of an effort to arrange a meeting with the child for the purpose of engaging in:

(A) Sexual intercourse;

(B) Sexually explicit conduct; or

(C) Deviate sexual activity;

(4) Compile, transmit, publish, reproduce, buy, sell, receive, exchange, or disseminate the name, telephone number, electronic mail address, residence address, picture, physical description, characteristics, or any other identifying information on an individual that the person believes to be fifteen (15) years of age or younger in furtherance of an effort to arrange a meeting with the individual for the purpose of engaging in:

(A) Sexual intercourse;

(B) Sexually explicit conduct; or

(C) Deviate sexual activity.

(b) Internet stalking of a child is a:

(1) Class B felony if the person attempts to arrange a meeting with a child fifteen (15) years of age or younger, even if a meeting with the child never takes place;

(2) Class B felony if the person attempts to arrange a meeting with an individual that the person believes to be fifteen (15) years of age or younger, even if a meeting with the individual never takes place; or

(3) Class A felony if the person arranges a meeting with a child fifteen (15) years of age or younger and an actual meeting with the child takes place, even if the person fails to engage the child in:

(A) Sexual intercourse;

(B) Sexually explicit conduct; or

(C) Deviate sexual activity.

(c) This section does not apply to a person or entity providing an electronic communications service to the public that is used by another person to violate this section, unless the person or entity providing an electronic communications service to the public:

(1) Conspires with another person to violate this section; or

(2) Knowingly aids and abets a violation of this section.

History. Acts 2005, No. 1776, § 1; 2007, No. 38, § 2; 2007, No. 827, §§ 36, 37.

Amendments. The 2007 amendment by No. 38 substituted "Class B" for "Class C" in (b)(1) and (2).

The 2007 amendment by No. 827, in (a), deleted "as defined in § 5-14-101" at the

end of (1)(C), (2)(C), (3)(C), and (4)(C); in (b)(3), deleted "any sexual activity" at the end of the introductory paragraph, and added (A) through (C); and made related changes.

RESEARCH REFERENCES

ALR. Validity, Construction, and Application of State Statutes Prohibiting Child Luring as Applied to Cases Involving Luring of Child by Means of Electronic Communications. 33 A.L.R.6th 373.

U. Ark. Little Rock L. Rev. Survey of Legislation, 2005 Arkansas General Assembly, Criminal Law, 28 U. Ark. Little Rock L. Rev. 335.

CASE NOTES

Evidence.

In defendant's trial for computer child pornography, § 5-27-603(a)(2), and internet stalking of a child, under subsection (a) of this section, the state did not fail to establish beyond a reasonable doubt that defendant believed the victim was only thirteen years old as the detective, who was the minor girl at the other end of the computer, told him that she was only thirteen years old in their correspondence and defendant noted the age difference as well as the fact that he would get into trouble if she told anyone about their chats. Kelley v. State, 103 Ark. App. 110, 286 S.W.3d 746 (2008).

Defendant's conviction for internet stalking of a child, in violation of subdivision (a)(2) of this section, was supported by the evidence where a "girl," who was really a police officer, informed defendant very early on that she was only 13 years old, defendant indicated that three condoms would suffice, and defendant indicated that they would decide after they met if she could "handle what he had." Gikonyo v. State, 102 Ark. App. 223, 283 S.W.3d 631 (2008).

Defendant's conviction for internet stalking of a child, in violation of subdivision (a)(2)(C) of this section, was supported by the evidence because the state presented evidence that defendant believed that he was talking to a 14-year-old girl; during one conversation, defendant asked the girl if she was still in high school, to which the girl replied that she was in the ninth grade. Jackson v. State, 2009 Ark. App. 466, 320 S.W.3d 13 (2009), rehearing denied, — Ark. App. —, — S.W.3d —, 2009 Ark. App. LEXIS 672 (July 29, 2009), review denied, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 568 (Sept. 17, 2009).

In a case in which defendant appealed his conviction for violating subdivision (a)(2)(C) of this section, he argued unsuccessfully that the state presented insufficient evidence showing that he believed that he was talking to someone fifteen years of age or under. While the jury could certainly infer from the context of the conversation that "Misty" might be in high school or college, the chat specifically stated at the outset that "Misty" was a fourteen-year-old female living in Conway, Arkansas; viewing the evidence in the light most favorable to the state, it could not be said that there was no substantial evidence on that point. Buffalo v. State, 2010 Ark. App. 127, — S.W.3d — (2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 226 (Apr. 22, 2010).

In a case in which defendant appealed his conviction for violating subdivision (a)(2)(C) of this section, he unsuccessfully argued that the evidence was insufficient to show that his purpose in meeting was to conduct inappropriate sexual acts. Even though defendant had stated that he did not have any condoms, the statute did not require a plan for sexual intercourse to be violated; given the discussion regarding oral sex, the sufficiency of the evidence was properly presented to the jury. Buffalo v. State, 2010 Ark. App. 127, — S.W.3d — (2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 226 (Apr. 22, 2010).

In a case in which defendant appealed his conviction for violating subdivision (a)(2)(C) of this section, he unsuccessfully argued the trial court abused its discretion in admitting into evidence a cut-and-paste word document from the police computer system because it was not properly

authenticated or the best evidence. The trial court did not abuse its discretion by deeming the printout sufficiently authenticated by the officer who conducted the chat and who converted it to a printable Wordpad document, and the trial court did not abuse its discretion in admitting the printout into evidence because it was properly authenticated and was admissible as a duplicate or an original. Buffalo v. State, 2010 Ark. App. 127, — S.W.3d — (2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 226 (Apr. 22, 2010).

Substantial evidence supported defendant's conviction for internet stalking of a child under this section as it supported a reasonable inference that defendant believed that a victim was under 15 years old and defendant admitted that defendant brought condoms to a prearranged meeting due to the possibility of having sex with the victim. Tipton v. State, 2011 Ark. App. 166, — S.W.3d — (2011).

Subchapter 4 — Use of Children in Sexual Performances

5-27-401. Definitions.

As used in this subchapter:

(1) "Performance" means any play, dance, act, drama, piece, interlude, pantomime, show, scene, or other three-dimensional presentation or a part of a play, dance, act, drama, piece, interlude, pantomime, show, scene, or other three-dimensional presentation, whether:

(A) Performed live or photographed;

(B) Filmed;

(C) Videotaped; or

(D) Visually depicted by any other photographic, cinematic, magnetic, or electronic means;

(2) "Promote" means to:

(A) Sell, give, provide, distribute, circulate, disseminate, present, exhibit, or advertise; or

(B) Offer or agree to sell, give, provide, distribute, circulate, disseminate, present, exhibit, or advertise;

(3) "Sadomasochistic abuse" means flagellation, mutilation, or torture by or upon a person who is nude or clad in an undergarment or in revealing or bizarre costume or the condition of being fettered, bound, or otherwise physically restrained on the part of one so clothed, in a sexual context;

(4) "Sexual conduct" means:

(A) Actual or simulated sexual intercourse;

(B) Deviate sexual activity;

(C) Sexual bestiality;

(D) Masturbation;

(E) Sadomasochistic abuse; or

(F) Lewd exhibition of the genitals or pubic area of any person or a breast of a female; and

(5) "Sexual performance" means any performance or part of a performance that includes sexual conduct by a child under eighteen (18) years of age.

History. Acts 1983, No. 451, § 1; A.S.A. 1947, § 41-4206; Acts 1995, No. 337, § 1; 1995, No. 1209, § 2; 2007, No. 827, § 38; 2011, No. 1190, § 2.

Amendments. The 2007 amendment deleted former (1) defining "deviate sexual intercourse."

The 2011 amendment substituted "eighteen (18)" for "seventeen (17)" in (5).

5-27-402. Employing or consenting to the use of a child in a sexual performance.

(a) It is unlawful for a person, knowing the character and content of the performance, to employ, authorize, or induce a child under eighteen (18) years of age to engage in a sexual performance.

(b) It is also unlawful for a parent or legal guardian or custodian of a child under eighteen (18) years of age to consent to the participation by the child in a sexual performance.

(c) A person who violates this section upon conviction is guilty of a:

(1) Class C felony for the first offense; and

(2) Class B felony for a subsequent offense.

History. Acts 1983, No. 451, § 2; A.S.A. 1947, § 41-4207; Acts 2011, No. 1190, § 3.

Amendments. The 2011 amendment substituted "eighteen (18)" for "seventeen (17)" in (a) and (b); and inserted "upon conviction" in the introductory language of (c).

5-27-403. Producing, directing, or promoting a sexual performance by a child.

(a) It is unlawful for a person, knowing the character and content of the material, to produce, direct, or promote a performance that includes sexual conduct by a child under eighteen (18) years of age.

(b) A person who violates this section upon conviction is guilty of a Class B felony.

History. Acts 1983, No. 451, § 3; A.S.A. 1947, § 41-4208; Acts 2011, No. 1190, § 4.

Amendments. The 2011 amendment substituted "eighteen (18)" for "seventeen (17)" in (a); and inserted "upon conviction" in (b).

5-27-404. Good faith defense.

It is an affirmative defense to a prosecution under this subchapter that the defendant in good faith reasonably believed that the person who engaged in the sexual conduct was eighteen (18) years of age or older.

History. Acts 1983, No. 451, § 4; A.S.A. 1947, § 41-4209; Acts 2011, No. 1190, § 5.
Amendments. The 2011 amendment substituted "eighteen (18)" for "seventeen (17)."

5-27-405. Determination of age of person.

When it becomes necessary for purposes of this subchapter to determine whether a person who participated in sexual conduct was a child under eighteen (18) years of age, the court or jury may make this determination by any of the following methods:

(1) Personal inspection of the person;

(2) Inspection of the photograph, motion picture, or other material that shows the person engaging in the sexual performance;

(3) Oral testimony by a witness to the sexual performance as to the age of the person based on the person's appearance at the time;

(4) Expert medical testimony based on the appearance of the person engaged in the sexual performance; or

(5) Any other method authorized by law.

History. Acts 1983, No. 451, § 5; A.S.A. 1947, § 41-4210; Acts 2011, No. 1190, § 6.
Amendments. The 2011 amendment substituted "eighteen (18)" for "seventeen (17)" in the introductory language; and inserted "or other material" in (2).

Subchapter 5 — Fraudulent Identification Documents for Minors

5-27-503. Possession of fraudulent or altered personal identification document unlawful.

(a) It is unlawful for:

(1) A person to possess a fraudulent or altered personal identification document for the purpose of providing a person under twenty-one (21) years of age identification that can be used for the purpose of purchasing an alcoholic beverage or other substance or material restricted for adult purchase or possession in accordance with existing law;

(2) A person under twenty-one (21) years of age to possess a fraudulent or altered personal identification document that can be used for the purpose of purchasing an alcoholic beverage or other substance or material restricted for adult purchase or possession in accordance with existing law; or

(3) A person under twenty-one (21) years of age to attempt to purchase an alcoholic beverage or use a fraudulent or altered personal identification document for the purpose of purchasing an alcoholic beverage illegally or other material or substance restricted to adult purchase or possession under existing law.

(b)(1)(A) If a seller of alcoholic beverages or the seller's employee has reasonable cause to believe that a person has violated subdivision (a)(3) of this section, the person may be detained in a reasonable manner and for a reasonable length of time by the seller of alcoholic

beverages or the seller's employee in order that the seller of alcoholic beverages or the seller's employee may call for a certified law enforcement officer to conduct an investigation.

(B) The detention authorized under subdivision (b)(1)(A) of this section does not include a physical detention.

(2) If the seller of alcoholic beverages or the seller's employee attempts to verify the age of the person attempting to purchase an alcoholic beverage by way of photographic identification and complies with subdivision (b)(1) of this section, the detention by a seller of alcoholic beverages or the seller's employee does not render the seller of alcoholic beverages or the seller's employee criminally or civilly liable for false arrest, false imprisonment, or unlawful detention.

(3) After conducting an investigation under subdivision (b)(1)(A) of this section and within twenty-four (24) hours of the call from a seller of alcoholic beverages or the seller's employee for the investigation, a certified law enforcement officer may arrest a person without a warrant upon probable cause for believing that the person has violated subdivision (a)(3) of this section.

(c)(1) A person who violates this section is deemed guilty of a Class B misdemeanor.

(2) A subsequent violation of this section is a Class A misdemeanor.

(d)(1) Except for a minor subject to the penalty authorized by § 5-27-504, in addition to any penalty authorized by subdivision (c)(1) or (2) of this section, at the time of arrest for a violation of subdivision (a)(3) of this section, the arrested person shall immediately surrender his or her license, permit, or other evidence of driving privilege to the arresting law enforcement officer as provided in § 5-65-402.

(2) The Office of Driver Services or its designated official shall suspend or revoke the driving privilege of the arrested person or shall suspend any nonresident driving privilege of the arrested person, as provided in § 5-65-402.

(3) The period of suspension or revocation of driving privilege of the arrested person shall be based on the number of previous offenses of the arrested person as follows:

(A) Suspension for sixty (60) days for a first offense under subdivision (a)(3) of this section;

(B) Suspension for one hundred twenty (120) days for a second offense under subdivision (a)(3) of this section; and

(C) Suspension for one (1) year for a third or subsequent offense under subdivision (a)(3) of this section.

(4) In order to determine the number of previous offenses under subdivision (d)(3) of this section to consider when suspending or revoking the arrested person's driving privileges, the office shall consider as a previous offense any conviction under subdivision (a)(3) of this section regardless of when the offense occurred.

History. Acts 1991, No. 567, § 3; 2005, No. 1976, § 1; 2007, No. 922, § 1.

Amendments. The 2007 amendment added (d).

Subchapter 6 — Computer Crimes Against Minors

5-27-603. Computer child pornography.

CASE NOTES

Analysis

Constitutionality.
Age of Child.
Sufficient Evidence.

Constitutionality.

Court did not agree with defendant's argument that this section was overbroad and unconstitutional on its face and as it applied to defendant and that it criminalized a substantial amount of lawful speech with no compelling state interest in doing so because the defendant's case involved actions rather than ideas. Defendant had conversations over the internet with an individual he thought was a thirteen year old girl, but was actually a police detective. Kelley v. State, 103 Ark. App. 110, 286 S.W.3d 746 (2008).

Age of Child.

In defendant's trial for computer child pornography, under subdivision (a)(2) of this section, and internet stalking of a child, § 5-27-306(a), the state did not fail to establish beyond a reasonable doubt that defendant believed the victim was only thirteen years old as the detective, who was the minor girl at the other end of the computer, told him that she was only thirteen years old in their correspondence and defendant noted the age difference as well as the fact that he would get into trouble if she told anyone about their chats. Kelley v. State, 103 Ark. App. 110, 286 S.W.3d 746 (2008).

Sufficient Evidence.

Substantial evidence supported defendant's conviction for computer child pornography, pursuant to subdivision (a)(2) of this section, because defendant's representations indicated that he believed the person he communicated with online to be a child, and defendant's sexually explicit comments provided sufficient evidence of the requisite state of mind under the statute. Trice v. State, 2010 Ark. App. 6, — S.W.3d — (2010).

Appellant's conviction for computer child pornography was affirmed where (1) both appellant and the screen name user were forty-six-year-old floor installers, with two sons; (2) the screen name user used appellant's personal computer, located in the bedroom appellant shared with his girlfriend, to communicate with an undercover persona of a thirteen year old girl between January and April 2009; (3) a webcam was found in appellant's bedroom behind some clutter in the computer desk; (4) appellant shared the home with his girlfriend and her minor daughter, and no other male lived with them; and (5) on April 6, 2009, two minutes after the screen name user and the undercover persona of a thirteen year old girl ended their first chat, appellant completed his taxes on the same computer. Fikes v. State, 2010 Ark. App. 803, — S.W.3d — (2010).

CHAPTER 28

ABUSE OF ADULTS

SUBCHAPTER.

1. General Provisions.

Subchapter 1 — General Provisions

SECTION.
5-28-110. Penalties for violation of § 12-12-1701 et seq.

5-28-101. Definitions.

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Survey of Legislation, 2005 Arkansas General Assembly, Education Law, 28 U. Ark. Little Rock L. Rev. 347.

CASE NOTES

Analysis

Abuse.
Exploitation.

Abuse.

Evidence was sufficient to convict defendant of abusing an adult, § 5-28-103, as the state proved the victim was an endangered or impaired adult, defendant was the caregiver responsible for her protection, care, or custody, defendant neglected her, as specified under subdivision (10) of this section, and the neglect caused serious physical injury or risk of death; defendant should have been aware of the risk to the victim, and his failure to perceive the risk posed to his mother was a gross deviation from the care a reasonable, prudent person would exercise under the circumstances. Law v. State, 375 Ark. 505, 292 S.W.3d 277 (2009).

Definition of abuse did not contain the requirement that the person committing the abuse be a caregiver, except if the victim was a resident in an adult long-term care facility. Thus, because appellant was convicted of abuse and not neglect, the state was not required to prove that appellant was a caregiver to the victim. Skomp v. State, 2010 Ark. App. 313, — S.W.3d — (2010).

There was sufficient evidence to support appellant's conviction for abuse of an endangered or impaired person where (1) the definition of abuse did not contain the requirement that the person committing the abuse be a caregiver, except under subdivision (1)(D) of this section, where the victim was a resident in an adult long-term care facility, which the victim in this case was not; (2) the state produced testimony that appellant would force the victim to stand for long periods of time and that he assisted in two other defendants' beatings of the victim, and produced evidence of the physical injuries with which she presented at the hospital; and (3) the state produced sufficient evidence to allow the jury to conclude that appellant's actions resulted in physical injury to the victim. Skomp v. State, 2010 Ark. App. 392, — S.W.3d — (2010).

Exploitation.

The evidence was sufficient to support defendant's conviction of abuse of an adult under § 5-28-103(a) because it showed both that the victim was vulnerable and that defendant exploited her. Exploitation was established where the evidence showed that defendant was hired to perform personal care, housekeeping duties, and errands for the infirm victim and her elderly mother, that defendant induced the victim to hire her directly rather than through a health care agency and to pay her more than $10,000 in advance when the victim's health deteriorated and her dependence increased, that defendant consistently made charges at retail stores with the victim's bank card that were greatly in excess of what had been normal for the victim prior to defendant's employment, that the retail charges increased as the victim's condition declined, and that, when the victim was hospitalized and died, defendant did not continue to care for the victim's mother or return the bank card but instead absconded with the victim's automobile. Jones v. State, 2009 Ark. App. 619, — S.W.3d — (2009).

5-28-103. Criminal penalties for abuse of an endangered or impaired person.

CASE NOTES

Analysis

Constitutionality.
Evidence.
Exploitation.

Constitutionality.

This section was not unconstitutionally vague in its definition of "caregiver" where the facts demonstrated that defendant clearly met the definition where he voluntarily assumed the responsibility for the protection, care, or custody of an endangered or impaired adult, and he was responsible for the care and supervision of that person; he was not an "entrapped innocent" and thus could not complain that the statute was unconstitutionally vague. Law v. State, 375 Ark. 505, 292 S.W.3d 277 (2009).

Evidence.

Evidence was sufficient to convict defendant of abusing an adult under this section as the state proved the victim was an endangered or impaired adult, defendant was the caregiver responsible for her protection, care, or custody, defendant neglected her, § 5-28-101(10), and the neglect caused serious physical injury or risk of death; defendant should have been aware of the risk to the victim, and his failure to perceive the risk posed to his mother was a gross deviation from the care a reasonable, prudent person would exercise under the circumstances. Law v. State, 375 Ark. 505, 292 S.W.3d 277 (2009).

Appellant's conviction for abuse of an impaired person was affirmed where (1) the definition of abuse did not contain the requirement that the person committing the abuse be a caregiver, except if the victim was a resident in an adult long-term care facility and the victim in this case was not a resident in an adult long-term care facility; (2) the state produced sufficient evidence to allow the jury to conclude that appellant's actions resulted in physical injury to the victim; and (3) when two people assisted one another in the commission of a crime, each was an accomplice and criminally liable for the conduct of both. Skomp v. State, 2010 Ark. App. 313, — S.W.3d — (2010).

There was sufficient evidence to support appellant's conviction for abuse of an endangered or impaired person where (1) the definition of abuse did not contain the requirement that the person committing the abuse be a caregiver, except under subdivision (1)(D) of this section, where the victim was a resident in an adult long-term care facility, which the victim in this case was not; (2) the state produced testimony that appellant would force the victim to stand for long periods of time and that he assisted in two other defendants' beatings of the victim, and produced evidence of the physical injuries with which she presented at the hospital; and (3) the state produced sufficient evidence to allow the jury to conclude that appellant's actions resulted in physical injury to the victim. Skomp v. State, 2010 Ark. App. 392, — S.W.3d — (2010).

Exploitation.

The evidence was sufficient to support defendant's conviction of abuse of an adult because it showed both that the victim was vulnerable and that defendant exploited her where the evidence showed that defendant was hired to perform personal care, housekeeping duties, and errands for the infirm victim and her elderly mother, that defendant induced the victim to hire her directly rather than through a health care agency and to pay her more than $10,000 in advance when the victim's health deteriorated and her dependence increased, that defendant consistently made charges at retail stores with the victim's bank card that were greatly in excess of what had been normal for the victim prior to defendant's employment, that the retail charges increased as the victim's condition declined, and that, when the victim was hospitalized and died, defendant did not continue to care for the victim's mother or return the bank card but instead absconded with the victim's automobile. Jones v. State, 2009 Ark. App. 619, — S.W.3d — (2009).

Cited: Klines v. State, 2010 Ark. App. 361, — S.W.3d — (2010).

5-28-110. Penalties for violation of § 12-12-1701 et seq.

(a) Any person or caregiver required by the Adult and Long-Term Care Facility Resident Maltreatment Act, § 12-12-1701 et seq., to report a case of suspected adult maltreatment or long-term care facility resident maltreatment who purposely fails to do so is:

(1) Guilty of a Class B misdemeanor; and

(2) Civilly liable for damages proximately caused by the failure.

(b) Any person, official, or institution willfully making a false notification by the Adult and Long-Term Care Facility Resident Maltreatment Act, § 12-12-1701 et seq., knowing the allegation to be false, is guilty of a:

(1) Class A misdemeanor; or

(2) Class D felony if the person, official, or institution has been previously convicted of making a false allegation.

(c) Any person who willfully permits and any other person who encourages the release of data or information contained in the adult and long-term care facility maltreatment central registry to a person to whom disclosure is not permitted under this section, § 5-28-201 [repealed], or §§ 5-28-203 — 5-28-221 [repealed] is guilty of a Class A misdemeanor.

(d) Any person required to report a death as the result of suspected adult maltreatment or long-term care facility resident maltreatment who knowingly fails to make a report immediately to the appropriate coroner is guilty of a Class C misdemeanor.

(e) Any person required to report suspected adult maltreatment or long-term care facility resident maltreatment who knowingly fails to make a report within twenty-four (24) hours or on the next business day, whichever is earlier, is guilty of a Class C misdemeanor.

History. Acts 1983, No. 452, § 13; A.S.A. 1947, § 59-1313; Acts 1993, No. 1292, § 5; 1995, No. 1338, § 2; 2003, No. 1046, § 13; 2005, No. 1810, § 8; 2005, No. 1994, § 298.

Publisher's Notes. This section is being set out to update a reference in the section heading and in the introduction language of (a) and (b).

SUBTITLE 4. OFFENSES AGAINST PROPERTY

CHAPTER 36

THEFT

SUBCHAPTER.

1. General Provisions.
3. Wireless Services Theft Prevention Law.

Subchapter 1 — General Provisions

5-36-101. Definitions.

CASE NOTES

Analysis

Deprivation.
Value.

Deprivation.

Evidence was sufficient to prove the theft element of aggravated robbery; evidence showed that defendant used physical force to at least temporarily deprive victim of her car, which was sufficient proof. Winston v. State, 368 Ark. 105, 243 S.W.3d 304 (2006).

Defendant's convictions for aggravated robbery and theft were proper because deprivation of property required only disposal under circumstances that made its restoration unlikely under subdivision (4)(C) of this section. Thus, defendant's actions in attempting to sell the victim's property following the homicide clearly showed a purpose to commit theft. Young v. State, 371 Ark. 393, 266 S.W.3d 744 (2007).

Value.

Under § 5-36-103, the state failed to produce substantial evidence as to the value of the stolen property; however, the state produced substantial evidence to support a finding that defendant acted with the requisite intent to commit the offense of theft of property, a class A misdemeanor. Gines v. State, 2009 Ark. App. 628, — S.W.3d — (2009).

In a case in which defendant was convicted on theft of property, in violation of § 5-36-103, even if he had preserved his claim that the evidence was insufficient to show that the value of the property was $2,500 or more, his conviction would be affirmed. The victim's testimony that he purchased the big-screen television for $1800 only four months prior to it being stolen was a factor that the court, as fact-finder, was permitted to consider, and the victim also testified that other items were stolen, including thousands of dollars in jewelry. Walker v. State, 2010 Ark. App. 63, — S.W.3d — (2010).

Trial court did not err in convicting defendant of theft of property with a value less than $2,500 but more than $500 in violation of § 5-36-103(a)(1) and (b)(2)(A) for stealing merchandise from a department store because a manager's testimony, in conjunction with the testimony of another employee, who was also a manager, was sufficient to lay the foundation for the introduction of a register receipt under the business-records exception to the hearsay rule, Ark. R. Evid. 803(6), as proof of the value of the stolen merchandise; the employee's testimony indicated that he knew the recovered items were stolen because they did not bear certain labels or electronic receipts that the store regularly places on all merchandise, the manager testified that he knew the value of the stolen merchandise by following the store's standard practice of adding up the value by ringing it up on the store's register, and the receipt bore an electronic date and time stamp, as well as other numeric information about the merchandise, including the label information from each item. Pace v. State, 2010 Ark. App. 491, — S.W.3d — (2010).

Cited: Russell v. State, 367 Ark. 557, 242 S.W.3d 265 (2006).

5-36-102. Consolidation of offenses — Shoplifting presumption — Theft by deception presumption at auction of livestock — Amount of theft.

(a) Conduct denominated theft in this chapter constitutes a single offense embracing the separate offenses known before January 1, 1976, as:

(1) Larceny;
(2) Embezzlement;
(3) False pretense;
(4) Extortion;
(5) Blackmail;
(6) Fraudulent conversion;
(7) Receiving stolen property; and
(8) Other similar offenses.

(b) Notwithstanding the specification of a different manner in the indictment or information, a criminal charge of theft may be supported by evidence that it was committed in any manner that would be theft under this chapter subject only to the power of the court to ensure a fair trial by granting a continuance or other appropriate relief if the conduct of the defense would be prejudiced by lack of fair notice or by surprise.

(c) The knowing concealment, upon an actor's person or the person of another, of an unpurchased good or merchandise offered for sale by any store or other business establishment, gives rise to a presumption that the actor took the good or merchandise with the purpose of depriving the owner or another person having an interest in the good or merchandise.

(d) A person who is subject to 7 U.S.C. § 181 et seq. that obtains livestock from a commission merchant by representing that the person will make prompt payment is presumed to have obtained the livestock by deception if the person fails to make payment in accordance with 7 U.S.C. § 228b.

(e)(1) The amount involved in a theft is deemed to be the highest value, by any reasonable standard, of the property or service that the actor obtained or attempted to obtain.

(2) An amount involved in a theft committed pursuant to one (1) scheme or course of conduct, whether from one (1) or more persons, may be aggregated in determining the grade of the offense.

History. Acts 1975, No. 280, § 2202; A.S.A. 1947, § 41-2202; Acts 2009, No. 1401, § 1.

Amendments. The 2009 amendment inserted "Theft by deception at auction of livestock presumption —" in the section heading; inserted present (d); and redesignated (d) as (e).

CASE NOTES

Evidence.

Appellants' convictions for theft of property were affirmed because substantial evidence supported the convictions where (1) while appellants maintained they were simply running a business and made some poor business decisions, the testimony of the victims established a pattern of taking

and exercising unauthorized control over the victims' money with the purpose of depriving the victims of their money; (2) the pattern demonstrated that appellants sold items to the victims, accepted the victims' money, purposefully and knowingly delayed delivery of the merchandise, and offered multiple and most often untrue excuses for why the orders did not arrive; and (3) the evidence showed that appellants would tell customers that an item was in shipping, was shipped in the wrong color, back ordered, or damaged in shipping. Williams v. State, 2009 Ark. App. 848, — S.W.3d — (2009).

5-36-103. Theft of property.

(a) A person commits theft of property if he or she knowingly:

(1) Takes or exercises unauthorized control over or makes an unauthorized transfer of an interest in the property of another person with the purpose of depriving the owner of the property; or

(2) Obtains the property of another person by deception or by threat with the purpose of depriving the owner of the property.

(b) Theft of property is a:

(1) Class B felony if:

(A) The value of the property is twenty-five thousand dollars ($25,000) or more;

(B) The property is obtained by the threat of serious physical injury to any person or destruction of the occupiable structure of another person;

(C) The property is obtained by threat and the actor stands in a confidential or fiduciary relationship to the person threatened;

(D) The property is:

(i) Anhydrous ammonia in any form; or

(ii) A product containing any percentage of anhydrous ammonia in any form; or

(E)(i) The property is utility property and the value of the property is five hundred dollars ($500) or more.

(ii) As used in subdivision (b)(1)(E)(i) of this section:

(a) "Utility" means any person or entity providing to the public gas, electricity, water, sewer, telephone, telegraph, radio, radio common carrier, railway, railroad, cable and broadcast television, video, or Internet services; and

(b) "Utility property" means any component that is reasonably necessary to provide utility services, including without limitation any wire, pole, facility, machinery, tool, equipment, cable, insulator, switch, signal, duct, fiber optic cable, conduit, plant, work, system, substation, transmission or distribution structure, line, street lighting fixture, generating plant, equipment, pipe, main, transformer, underground line, gas compressor, meter, or any other building or structure or part of a building or structure that a utility uses in the production or use of its services;

(2) Class C felony if:

(A) The value of the property is less than twenty-five thousand dollars ($25,000) but more than five thousand dollars ($5,000);

(B) The property is obtained by threat;

(C) The property is a firearm valued at two thousand five hundred dollars ($2,500) or more;

(D)(i) The property is building material obtained from a permitted construction site and the value of the building material is five hundred dollars ($500) or more.

(ii) As used in subdivision (b)(2)(D)(i) of this section:

(a) "Building material" means lumber, a construction tool, a window, a door, copper tubing or wire, or any other material or good used in the construction or rebuilding of a building or a structure; and

(b) "Permitted construction site" means the site of construction, alteration, painting, or repair of a building or a structure for which a building permit has been issued by a city of the first class, a city of the second class, an incorporated town, or a county; or

(E) The value of the property is five hundred dollars ($500) or more and the theft occurred in an area declared to be under a state of emergency pursuant to proclamation by the President of the United States, the Governor, or the executive officer of a city or county;

(3) Class D felony if:

(A) The value of the property is five thousand dollars ($5,000) or less but more than one thousand dollars ($1,000);

(B) The property is a firearm valued at less than two thousand five hundred dollars ($2,500);

(C) The property is a:

(i) Credit card or credit card account number; or

(ii) Debit card or debit card account number;

(D) The value of the property is at least one hundred dollars ($100) or more but less than five hundred dollars ($500) and the theft occurred in an area declared to be under a state of emergency pursuant to proclamation by the President of the United States, the Governor, or the executive officer of a city or county;

(E) The property is livestock and the value of the livestock is in excess of two hundred dollars ($200); or

(F) An electric power line, gas line, water line, wire or fiber insulator, electric motor, or other similar apparatus connected to a farm shop, on-farm grain drying and storage complex, heating and cooling system, environmental control system, animal production facility, irrigation system, or dwelling; or

(4) Class A misdemeanor if:

(A) The value of the property is one thousand dollars ($1,000) or less; or

(B) The property has inherent, subjective, or idiosyncratic value to its owner or possessor even if the property has no market value or replacement cost.

(c)(1) Upon the proclamation of a state of emergency by the President of the United States or the Governor or upon the declaration of a local emergency by the executive officer of any city or county and for a period of thirty (30) days following that declaration, the penalty for theft of property is enhanced if the property is:

(A) A generator intended for use by:
(i) A public facility;
(ii) A nursing home or hospital;
(iii) An airport;
(iv) A public safety device;
(v) A communication tower or facility;
(vi) A public utility;
(vii) A water system or sewer system;
(viii) A public safety agency; or
(ix) Any other facility or use providing a vital service; or

(B) Any other equipment used in the transmission of electric power or telephone service.

(2) As used in this subsection:

(A) "Public safety agency" means an agency of the State of Arkansas or a functional division of a political subdivision that provides:
(i) Firefighting and rescue;
(ii) Natural or human-caused disaster or major emergency response;
(iii) Law enforcement; or
(iv) Ambulance or emergency medical services; and

(B) "Public safety device" includes, but is not limited to, a traffic signaling device or a railroad crossing device.

(3) The penalty is enhanced as follows:

(A)(i) The fine for the offense shall be at least five thousand dollars ($5,000) and not more than fifty thousand dollars ($50,000).
(ii) The fine is mandatory; and

(B) The offense is a Class D felony if it would have been a Class A misdemeanor.

History. Acts 1975, No. 280, § 2203; 1977, No. 360, § 8; 1979, No. 592, § 1; 1983, No. 719, § 1; A.S.A. 1947, § 41-2203; Acts 1987, No. 934, § 3; 1991, No. 712, § 1; 1995, No. 277, § 1; 1997, No. 516, § 1; 2001, No. 157, § 1; No. 1195, § 1; 2003, No. 838, § 1; 2005, No. 1442, § 1; 2007, No. 693, § 1; 2007, No. 827, § 39; 2009, No. 1295, § 2; 2011, No. 570, § 23; 2011, No. 1120, § 8; 2011, No. 1227, § 1.

A.C.R.C. Notes. Acts 2009, No. 1295, § 1, provided: "This act shall be known and may be cited as the 'Private Property Protection Act'."

Acts 2011, No. 570, § 1, provided: "Legislative intent. The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Pursuant to Acts 2011, No. 1120, § 16, the amendments to this section by Acts 2011, No. 1120, § 8 are partially superseded by the amendments to this section by Acts 2011, No. 570, § 23.

Amendments. The 2007 amendment by No. 693 added (b)(1)(E) and made related changes.

The 2007 amendment by No. 827 substituted "Firefighting" for "Fire fighting" in (c)(2)(A)(i), and substituted "or" for "and" in (c)(2)(A)(iii).

The 2009 amendment added (b)(1)(F) and (b)(2)(F); deleted "(c)" at the end of the introductory language of (c)(2); and made related changes.

The 2011 amendment by No. 570 rewrote the section.

The 2011 amendment by No. 1120 inserted present (b)(3)(F).

The 2011 amendment by No. 1227 inserted present (b)(1)(E).

CASE NOTES

Analysis

Deception.
Dismissal Not Warranted.
Evidence.
—Sufficiency.
Jurisdiction.
Value.

Deception.

State presented substantial evidence that defendant knowingly deceived a wholesale and retail distributor of petroleum products in an effort to get fuel for a convenience store and gas station owned by defendant's wife; there was substantial evidence that defendant deceived the distributor by falsely representing himself as owner of the store and property used as collateral, and the representations were made to induce the distributor to continue supplying fuel. Iqbal v. State, 2011 Ark. App. 221, — S.W.3d — (2011).

Dismissal Not Warranted.

Where charges against defendant for alleging defrauding insurers were dismissed, this did not mandate a later dismissal of subsequently filed charges alleging Medicaid fraud under res judicata, issue preclusion, or § 5-1-113 because the crimes were not the same. Dilday v. State, 369 Ark. 1, 250 S.W.3d 217 (2007).

Evidence.

Defendant's conviction for theft of property from a former employer, in violation of subdivision (a)(1) of this section, was not supported by the evidence because the factfinder had to speculate to choose whether defendant stole a crane and winches or whether the equipment was sold outside a cashier's presence and the cashier did not see customers outside the store; the state presented no evidence, documentary or oral, of merchandise actually missing from the store's inventory. King v. State, 100 Ark. App. 208, 266 S.W.3d 205 (2007).

Evidence was sufficient to sustain defendant's convictions for aggravated robbery, residential burglary, and felony theft of property because an accomplice testified that he and defendant had a purpose of committing theft when they went to the victim's apartment, defendant used physical force upon the victim, defendant was armed with a deadly weapon, and a witness testified that she observed defendant carry out a television and load it into the car. Navarro v. State, 371 Ark. 179, 264 S.W.3d 530 (2007).

Defendant's convictions for aggravated robbery and theft were proper because defendant employed physical force upon the victim, admitted to stabbing the victim, and was armed with a deadly weapon. Further, the fact that defendant pawned the victim's tools and tried to sell other stolen items established a purpose to commit theft. Young v. State, 371 Ark. 393, 266 S.W.3d 744 (2007).

The state was not entitled to a rehearing of a decision overturning defendant's conviction for theft under subdivision (a)(1) of this section because the evidence was insufficient as it left the fact-finder to speculation and conjecture; the state proved only that a co-worker saw defendant moving a store's hardware out the front door. Defendant's job at the store, however, was to move hardware; without more, the co-worker's testimony did not prove that defendant was guilty of exercising unauthorized control over any store item with the purpose of permanently depriving the store of it. King v. State, 100 Ark. App. 211, 266 S.W.3d 205 (2007).

Substantial evidence indicated that defendant was armed with a deadly weapon for the purpose of committing theft, and defendant was part of a plan to take the victim's money; there did not have to be an actual transfer of property to take place for the offense of aggravated robbery to be complete, and defendant and another clearly followed through with the plan, whether or not they verbally acknowledged their agreement at the time the plan was conceived. Moore v. State, 372 Ark. 579, 279 S.W.3d 69 (2008).

In defendant's attempted capital murder case, the state presented substantial evidence of defendant's intent to commit theft because there was the victim's testimony, in which she stated that defendant told her that he was going to rob her, there was the fact that two twenty-dollar bills and some quarters were missing from the store after the attack, and there was also defendant's own videotaped statement in

which he admitted to taking money from the cash register. Goodwin v. State, 373 Ark. 53, 281 S.W.3d 258 (2008).

Where the victim testified that he discovered that two jars of coins were missing from his house after a visit from defendant and his cohort, an employee of a grocery store saw defendant's cohort cash in the coins and then throw away a jar; the theft victim identified the jar as his. In the second case, the victim testified that a five-gallon water jug filled with coins was stolen from his house shortly after he had spoken with defendant and his cohort at a club; based on the circumstantial evidence, along with defendant's admission that he had stolen coins from the second victim before, the evidence was sufficient to support defendant's conviction for two counts of theft under subsection (a) of this section. Mathis v. State, 2009 Ark. App. 181, 314 S.W.3d 280 (2009).

When a trailer was removed from the owner's property without her permission, defendant stated that he purchased the trailer from a third party and it was parked on his property. The evidence was sufficient to show that defendant possessed the trailer with the intent to deprive the owner of the property in violation of this section; defendant was properly convicted of the theft of property with a value between $500 and $2500 in violation of this section. Gray v. State, 2009 Ark. App. 572, — S.W.3d — (2009).

Where the state's witness testified that she and defendant drove to the victim's RV in order to rob the victim, defendant entered the residence, grabbed the victim's wallet, handed it to the witness, and then she heard a pop sound; a second witness testified that he had seen defendant with a handgun that day, and defendant told him that he had shot the victim in the head. After the victim was found dead, defendant was convicted of first degree felony murder in violation of § 5-10-102(a)(1) with theft as the underlying felony under this section; defendant's challenge to the sufficiency of the evidence supporting his conviction for theft was denied. Lockhart v. State, 2009 Ark. App. 587, — S.W.3d — (2009).

Evidence was sufficient to support defendant's convictions for residential burglary and theft of property where defendant pawned a gun and a pendant that were stolen from the victims' home and, according to a witness, defendant admitted that he participated in the burglary and theft. Stigger v. State, 2009 Ark. App. 596, — S.W.3d — (2009).

Under this section, the state failed to produce substantial evidence as to the value of the stolen property; however, the state produced substantial evidence to support a finding that defendant acted with the requisite intent to commit the offense of theft of property, a class A misdemeanor. Gines v. State, 2009 Ark. App. 628, — S.W.3d — (2009).

Appellants' convictions for theft of property were affirmed because substantial evidence supported the convictions where (1) while appellants maintained they were simply running a business and made some poor business decisions, the testimony of the victims established a pattern of taking and exercising unauthorized control over the victims' money with the purpose of depriving the victims of their money; (2) the pattern demonstrated that appellants sold items to the victims, accepted the victims' money, purposefully and knowingly delayed delivery of the merchandise, and offered multiple and most often untrue excuses for why the orders did not arrive; and (3) the evidence showed that appellants would tell customers that an item was in shipping, was shipped in the wrong color, back ordered, or damaged in shipping. Williams v. State, 2009 Ark. App. 848, — S.W.3d — (2009).

Evidence was sufficient to support defendant's conviction for misdemeanor theft of property in violation of subdivision (a)(1) of this section because he beat and kicked the victim, took his cell phone and wallet, asked for additional money, threatened to shoot him, and ran away; the evidence was sufficient to establish that defendant either took the items in question or participated in taking them and that afterward he fled from the scene of the crime, and it was of no consequence whether defendant was the principal or an accomplice. Sims v. State, 2010 Ark. App. 133, — S.W.3d — (2010).

Defendant's convictions for breaking or entering and theft of property in violation of subdivision (a)(1) of this section were proper because there was substantial evidence showing that defendant, for the purpose of committing a theft or felony, broke into the victim's vehicle. Substantial evidence also existed to support the

finding that defendant knowingly took and exercised unauthorized control over the victim's tow-truck keys with the purpose of depriving the victim of them. Washington v. State, 2010 Ark. App. 339, — S.W.3d — (2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 379 (June 24, 2010).

Bank customer properly charged with theft where while the customer did not bear any criminal intent when she deposited the check and withdrew the funds, she later realized that it was probably a fake and decidedly refused to repay the original owner, the bank, when the check was discovered to indeed be counterfeit. Brooks v. First State Bank, N.A., 2010 Ark. App. 342, — S.W.3d — (2010), rehearing denied, — Ark. App. —, — S.W.3d —, 2010 Ark. App. LEXIS 518 (June 2, 2010).

Defendant admitted to taking credit cards without permission and unlawfully entering a home without permission, and that defendant drove a car and wrecked it; thus, the state offered sufficient proof that defendant committed theft of property under subdivision (a)(1) of this section. Cody v. State, 2010 Ark. App. 542, — S.W.3d — (2010).

Defendant's convictions for breaking or entering, in violation of § 5-39-202(1), and theft of property, in violation of subdivision (a)(1) of this section, were supported by the evidence because defendant's unlawful presence near a storage shed, flight from the victim, and association with persons involved in the crimes suggested that defendant jointly participated in the crimes under § 5-2-402(a)(2). Goforth v. State, 2010 Ark. App. 735, — S.W.3d — (2010).

Evidence that one of the victims of a home-invasion robbery gave defendant her cell phone after seeing him pull one of the other victims out from under a bed by her hair was sufficient to sustain defendant's conviction of theft of property. Morris v. State, 2011 Ark. App. 12, — S.W.3d — (2011).

Evidence that defendant took money from a store while openly brandishing a firearm was sufficient to support his conviction for theft of property. Lambert v. State, 2011 Ark. App. 258, — S.W.3d — (2011).

—Sufficiency.

Defendant's convictions for breaking or entering and theft of property were affirmed where defendant's fingerprints were found inside the passenger door along the top edge of the window of the car that was broken into. Phillips v. State, 88 Ark. App. 17, 194 S.W.3d 222 (2004), aff'd, 361 Ark. 1, 203 S.W.3d 630 (2005).

Evidence was sufficient to sustain defendant's forgery and theft convictions where she did not offer a reasonable explanation of how she acquired the forged check; therefore, an inference that she committed the forgery or was an accessory to its commission was warranted and the court did not err in inferring defendant's intent. DeShazer v. State, 94 Ark. App. 363, 230 S.W.3d 285 (2006).

Evidence was sufficient to convict defendant of first degree murder and theft where, in addition to the testimony of defendant's wife, who was an accomplice, defendant's own statements to the police, his conduct before and after the crime, and statements of the victim's friends regarding her fear of defendant tended to connect him to the crimes; further, although there was no evidence that defendant ever drove victim's Cadillac or had the vehicle in his possession, the jury might have determined that defendant facilitated the theft by leaving the accomplice without a vehicle at the victim's house, and there was evidence that the theft of the Cadillac was part of the plan to murder the victim. MacKool v. State, 365 Ark. 416, 231 S.W.3d 676 (2006).

Evidence was sufficient to prove the theft element of aggravated robbery; evidence showed that defendant used physical force to at least temporarily deprive victim of her car, which was sufficient proof. Winston v. State, 368 Ark. 105, 243 S.W.3d 304 (2006).

In a case in which defendant was convicted on theft of property, in violation of this section, and he argued on appeal that the evidence was insufficient to show that the value of the property exceeded $2,500 or more, he had not preserved that issue for appeal. His Ark. R. Crim. P. 33.1(b) motion for dismissal and renewal of that motion made no mention whatsoever of the value of the stolen property. Walker v. State, 2010 Ark. App. 63, — S.W.3d — (2010).

In a case in which defendant was convicted on theft of property, in violation of this section, even if he had preserved his claim that the evidence was insufficient to

show that the value of the property was $2,500 or more, his conviction would be affirmed. The victim's testimony that he purchased the big-screen television for $1800 only four months prior to it being stolen was a factor that the court, as fact-finder, was permitted to consider, and the victim also testified that other items were stolen, including thousands of dollars in jewelry. Walker v. State, 2010 Ark. App. 63, — S.W.3d — (2010).

Evidence was sufficient to support defendant's conviction for theft of property valued in excess of $500 but less than $2,500, pursuant to subdivision (b)(2)(A) of this section, because a store owner based her calculation of the amount stolen on business records, under Ark. R. Evid. 803(6). Further, a police detective's testimony that over $670 was found on the persons of defendant and his accomplice following the theft, and that an additional $503, which defendant had hidden, was found the following day, was more than enough to prove that defendant stole over $500. Scott v. State, 2010 Ark. App. 114, — S.W.3d — (2010).

Jurisdiction.

Arkansas trial court had jurisdiction over defendant, a Georgia resident, during his trial for theft of property and computer fraud where defendant caused the victim, an Arkansas resident, to access her computer by virtue of his email correspondence for the purpose of obtaining money with a false or fraudulent intent, representation, or promise. Powell v. State, 97 Ark. App. 239, 246 S.W.3d 891 (2007).

Value.

Trial court did not err in denying defendant's motion to dismiss two charges for theft of property in excess of $2,500, in violation of subdivision (b)(1)(A) of this section, on the ground that the charges were barred by the three-year statute of limitations for Class B felonies in § 5-1-109(b)(2) because the amended information was filed within three years of the earliest unauthorized withdrawal from a client's account that was made by defendant, an attorney. Cameron v. State, 94 Ark. App. 58, 224 S.W.3d 559 (2006), appeal dismissed, — Ark. —, — S.W.3d —, 2007 Ark. LEXIS 496 (Sept. 27, 2007).

Trial court did not err in convicting defendant of theft of property with a value less than $2,500 but more than $500 in violation of subdivisions (a)(1) and (b)(2)(A) of this section for stealing merchandise from a department store because a manager's testimony, in conjunction with the testimony of another employee, who was also a manager, was sufficient to lay the foundation for the introduction of a register receipt under the business-records exception to the hearsay rule, Ark. R. Evid. 803(6), as proof of the value of the stolen merchandise; the employee's testimony indicated that he knew the recovered items were stolen because they did not bear certain labels or electronic receipts that the store regularly places on all merchandise, the manager testified that he knew the value of the stolen merchandise by following the store's standard practice of adding up the value by ringing it up on the store's register, and the receipt bore an electronic date and time stamp, as well as other numeric information about the merchandise, including the label information from each item. Pace v. State, 2010 Ark. App. 491, — S.W.3d — (2010).

5-36-104. Theft of services.

(a) A person commits theft of services if, with purpose to defraud:

(1) The person purposely obtains a service that he or she knows to be available only for compensation, by deception, threat, or other means to avoid payment for the service; or

(2) Having control over the disposition of a service to which he or she is not entitled, the person purposely diverts the service to his or her own benefit or to the benefit of another person not entitled to the service.

(b) In a circumstance in which payment is ordinarily made immediately upon the rendering of a service, absconding without payment or

offer to pay gives rise to a presumption that the actor obtained the service with the purpose of avoiding payment.

(c) Theft of services is a:

(1) Class B felony if:

(A) The value of the service is twenty-five thousand dollars ($25,000) or more;

(B) The service is obtained by the threat of serious physical injury to any person or destruction of the occupiable structure of another person;

(C) The service is obtained by threat, and the actor stands in a confidential or fiduciary relationship to the person threatened; or

(D) The theft of services involves a theft of a utility service that results in:

(i) Any contamination of a line, pipe, waterline, meter, or other utility property; or

(ii) A spill, dumping, or release of any hazardous material into the environment;

(2) Class C felony if:

(A) The value of the service is less than twenty-five thousand dollars ($25,000) but more than five thousand dollars ($5,000); or

(B) The service is obtained by threat; or

(3) Class D felony if the value of the service is five thousand dollars ($5,000) or less but more than one thousand dollars ($1,000); or

(4) Class A misdemeanor if the theft of services:

(A) Involves a theft of a utility service that results in the destruction or damage to a line, pipe, waterline, meter, or any other property of the utility; or

(B) Is otherwise committed.

(d)(1) In addition to any other fine that may be levied under § 5-4-201, any person found guilty of theft of services under this section is required to make full restitution to the utility from which the service was obtained if the theft of services involves the theft of a utility service such as a gas, electricity, water, telephone, or cable television service.

(2) For a prosecution brought under this subsection to enable the court to properly fix the amount of restitution, after appropriate investigation the prosecuting attorney shall recommend an amount that would make the utility whole with respect to:

(A) The value of the service received;

(B) The cost of repair of any damage to any:

(i) Line;

(ii) Pipe;

(iii) Waterline;

(iv) Meter; or

(v) Other utility property; and

(C) Any other measurable monetary damage directly related to the offense, including the expense of investigation.

(3) If the defendant disagrees with the recommendation of the prosecuting attorney, he or she is entitled to introduce evidence in mitigation of the amount recommended.

(4) The monetary judgment for restitution, as provided in this section, becomes a judgment against the offender and has the same force and effect as any other civil judgment recorded in this state.

History. Acts 1975, No. 280, § 2204; 1977, No. 360, § 9; 1983, No. 719, § 2; A.S.A. 1947, § 41-2204; Acts 1997, No. 518, § 1; 1999, No. 986, § 1; 2011, No. 570, § 24; 2011, No. 1120, § 15; 2011, No. 1120, § 15.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "Legislative intent. The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Amendments. The 2011 amendment by No. 570 substituted "twenty-five thousand dollars ($25,000)" for "two thousand five hundred dollars ($2,500)" in (c)(1)(A) and (c)(2)(A); substituted "five thousand dollars ($5,000)" for "five hundred dollars ($500)" in (c)(2)(A); inserted present (c)(3) and redesignated former (c)(3) as (c)(4); and rewrote (c)(4).

The 2011 amendment by No. 1120 inserted the (c)(4)(A) designation and (c)(4)(B).

5-36-105. Theft of property lost, mislaid, or delivered by mistake.

CASE NOTES

Sufficiency of Evidence.

As the victim exited her truck, a man grabbed her by her neck, put a gun to her head, and asked for her keys; she was forced into her residence and heard a shotgun fire as the man drove away. The police spotted the truck traveling at a high rate of speed apparently in flight from the scene of the crime and defendant's fingerprint was recovered from the doors; the evidence was not sufficient to sustain defendant's conviction for aggravated robbery, theft of property, and criminal mischief because there was no way to determine when defendant touched the truck. Turner v. State, 103 Ark. App. 248, 288 S.W.3d 669 (2008), review denied, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 514 (Jan. 22, 2009).

Defendant's conviction for theft of property lost, mislaid, or mistakenly delivered was supported by the evidence because defendant failed to take reasonable measures to return a double payment made to defendant's business on behalf of a customer, and acted with purposeful intent under § 5-2-202(1) of depriving the victims. Cora v. State, 2009 Ark. App. 431, 319 S.W.3d 281 (2009).

5-36-106. Theft by receiving.

(a) A person commits the offense of theft by receiving if he or she receives, retains, or disposes of stolen property of another person:

(1) Knowing that the property was stolen; or

(2) Having good reason to believe the property was stolen.

(b) As used in this section, "receiving" means acquiring possession, control, or title or lending on the security of the property.

(c) The following give rise to a presumption that a person knows or believes that property was stolen:

(1) The unexplained possession or control by the person of recently stolen property; or

(2) The acquisition by the person of property for a consideration known to be far below the property's reasonable value.

(d) It is a defense to a prosecution for the offense of theft by receiving that the property is received, retained, or disposed of with the purpose

of restoring the property to the owner or another person entitled to the property.

(e) Theft by receiving is a:

(1) Class B felony if the value of the property is twenty-five thousand dollars ($25,000) or more;

(2) Class C felony if the value of the property is less than twenty-five thousand dollars ($25,000) but more than five thousand dollars ($5,000);

(3) Class D felony if:

(A) The value of the property is five thousand dollars ($5,000) or less but more than one thousand dollars ($1,000);

(B) The property is a:

(i) Credit card or credit card account number; or

(ii) Debit card or debit card account number; or

(4) Class A misdemeanor if otherwise committed.

History. Acts 1975, No. 280, § 2206; 1977, No. 360, § 10; 1983, No. 719, § 3; A.S.A. 1947, § 41-2206; Acts 1997, No. 303, § 1; 1997, No. 516, § 3; 2003, No. 838, § 3; 2011, No. 570, § 25.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "Legislative intent. The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Amendments. The 2011 amendment substituted "twenty-five thousand dollars ($25,000)" for "two thousand five hundred dollars ($2,500)" in (e)(1); inserted (e)(2) and redesignated the remaining subdivisions accordingly; substituted "Class D" for "Class C" in the introductory paragraph of (e)(3); in (e)(3)(A), substituted "five thousand dollars ($5,000) or less" for "less than two thousand five hundred dollars ($2,500)" and "one thousand dollars ($1,000)" for "five hundred dollars ($500)"; and deleted (e)(3)(C).

CASE NOTES

Analysis

Evidence.
Knowledge and Intent.
Sentence.
Value.

Evidence.

At the time the offense was committed, this section provided that theft by receiving of a credit card was designated as a Class C felony, but theft by receiving of a debit card was not; thus, where the state failed to show that the card was a credit card, there was insufficient evidence to support the conviction for theft by receiving as a Class C felony and defendant's conviction was reduced to a misdemeanor in accordance with subdivision (e)(3) of this section. Withers v. State, 93 Ark. App. 276, 218 S.W.3d 386 (2005).

Defendant's conviction for theft by receiving was proper as the evidence established that his companion was in the store where the victim worked around the time that her credit card was stolen, defendant presented that credit card at a gas station a short time later, and defendant and his companion tried to purchase over $100 in merchandise. Henson v. State, 94 Ark. App. 163, 227 S.W.3d 450 (2006).

Evidence was sufficient to sustain defendant's conviction for theft by receiving because defendant stated that the seller wanted $275 for several items, including an air compressor, a welder, a crate with several hand tools, and a saw. Defendant also admitted that he knew that the property "either had to be stolen or traded for drugs." Tryon v. State, 371 Ark. 25, 263 S.W.3d 475 (2007).

Evidence was sufficient to convict defendant of theft by receiving, because the state presented evidence showing that the VIN numbers of the owner's truck and the truck recovered from the scene were the same, the owner testified that the recovered truck was similar to his own truck,

defendant's fingerprint was on an item found near the truck and he was in photographs found inside the truck, and defendant was observed driving a truck similar to the stolen truck to his storage unit. Tomboli v. State, 100 Ark. App. 355, 268 S.W.3d 918 (2007).

Evidence was sufficient to show that defendant committed theft by receiving of the car keys, because defendant conceded the keys belonged to the victim, and the unrebutted evidence showed the stolen keys were found in the car that defendant and his accomplices used for the burglary of the victim's residence. Lewis v. State, 2009 Ark. App. 504, 323 S.W.3d 640 (2009).

In a case in which a minor was adjudicated delinquent pursuant to a juvenile court's finding that he committed the criminal offense of misdemeanor theft by receiving, in violation of subsection (a) of this section, the minor unsuccessfully argued that a witness's testimony had to be corroborated. Since the minor had been charged with a misdemeanor, § 16-89-111(e)(1) did not apply. R.W. v. State, 2010 Ark. App. 220, — S.W.3d — (2010).

Evidence that defendant had the victim's credit card and driver's license and that he attempted to cash a forged check was sufficient to support his convictions for theft by receiving under this section and forgery under § 5-37-201. Suggs v. State, 2010 Ark. App. 571, — S.W.3d — (2010).

Evidence was sufficient to revoke defendant's suspended imposition of sentence for the underlying crime of theft by receiving where defendant sold a bus for scrap but there was no evidence that indicated how or why defendant came to be in possession of a bus that the owner had reported stolen that same day. Caldwell v. State, 2011 Ark. App. 358, — S.W.3d — (2011).

Knowledge and Intent.

Where a gun in defendant's possession matched the serial number of a revolver that had been reported missing approximately four months before defendant was found with the gun, a jury was entitled to find, as a matter of fact, that the gun had been "recently stolen," thus giving rise to the statutory presumption that defendant had knowledge of the gun's status as stolen property. Williams v. State, 93 Ark. App. 353, 219 S.W.3d 676 (2005).

Evidence was sufficient to sustain a conviction for theft by receiving because defendant was in possession of the stolen property, riding and selling one four-wheeler to her ex-husband prior to it becoming public knowledge that the four-wheelers were stolen, and defendant made statements in her alleged attempt to help the deprived owners locate their property that she wanted revenge on her husband whom she accused of committing the theft. Eaton v. State, 98 Ark. App. 39, 249 S.W.3d 812 (2007).

Sentence.

Although defendant's Class C felony conviction for theft by receiving in excess of $500.00 could not stand, defendant did not challenge the sufficiency of the evidence showing that he was generally guilty of theft by receiving and, as the value of the stolen generator was at most $499.99, defendant still stood convicted of a Class A misdemeanor; accordingly, his conviction was modified to reflect the maximum sentence for a Class A misdemeanor of one year, with credit for any time defendant had already served. Russell v. State, 367 Ark. 557, 242 S.W.3d 265 (2006).

In a case in which a minor was adjudicated delinquent pursuant to the juvenile court's finding that he committed the criminal offense of misdemeanor theft by receiving, in violation of subsection (a) of this section, the trial court did not err by revoking the minor's probation from a previous adjudication. He was required to obey all state, federal, and municipal laws as a condition of his probation, and substantial evidence supported the trial court's decision to adjudicate him delinquent. R.W. v. State, 2010 Ark. App. 220, — S.W.3d — (2010).

Value.

Because the sales tax should not have been included in computing the value of the generator, and the state failed to prove that the warranty was stolen along with the generator, defendant's Class C felony conviction could not stand; however, defendant did not challenge the sufficiency of the evidence showing that he was generally guilty of theft by receiving and, as the value of the generator was at most $499.99, defendant still stood convicted of a Class A misdemeanor. Russell v. State, 367 Ark. 557, 242 S.W.3d 265 (2006).

Cited: ; Misenheimer v. State, 100 Ark. App. 189, 265 S.W.3d 764 (2007).

5-36-116. Shoplifting.

(a)(1) A person engaging in conduct giving rise to a presumption under § 5-36-102(c) may be detained in a reasonable manner and for a reasonable length of time by a law enforcement officer, merchant, or merchant's employee in order that recovery of a good may be effected.

(2) The detention by a law enforcement officer, merchant, or merchant's employee does not render the law enforcement officer, merchant, or merchant's employee criminally or civilly liable for false arrest, false imprisonment, or unlawful detention.

(b)(1) If sufficient notice has been posted to advise patrons that an antishoplifting or inventory control device is being utilized, the activation of an antishoplifting or inventory control device as a result of a person's exiting an establishment or a protected area within the establishment constitutes reasonable cause for the detention of the person so exiting by the owner or operator of the establishment or by an agent or employee of the owner or operator.

(2) Any detention under subdivision (b)(1) of this section shall be made only in a reasonable manner and only for a reasonable period of time sufficient for any inquiry into the circumstances surrounding the activation of the antishoplifting or inventory control device or for the recovery of a good.

(3) A detention under subdivision (b)(1) of this section by a law enforcement officer, merchant, or merchant's employee does not render the law enforcement officer, merchant, or merchant's employee criminally or civilly liable for false arrest, false imprisonment, or unlawful detention.

(c) As used in this section, "antishoplifting or inventory control device" means a mechanism or other device designed and operated for the purpose of detecting the removal from a mercantile establishment or similar enclosure or from a protected area within a mercantile establishment or similar enclosure.

(d)(1) Upon probable cause for believing a suspect has committed the offense of shoplifting, a law enforcement officer may arrest the person without a warrant.

(2) The law enforcement officer, merchant, or merchant's employee who has observed the person accused of committing the offense of shoplifting shall provide a written statement that serves as probable cause to justify the arrest.

(3) The accused person shall be brought immediately before a magistrate and afforded an opportunity to make a bond or recognizance as in other criminal cases.

History. Acts 1957, No. 50, § 4; 1971, No. 164, § 1; 1975, No. 458, § 1; 1975, No. 928, § 15; 1983, No. 551, § 1; 1985, No. 404, § 1; A.S.A. 1947, § 41-2251; Acts 2005, No. 1994, § 246.

Publisher's Notes. This section is being set out to reflect corrections in (a)(1).

5-36-120. Theft of motor fuel.

(a) A person commits the offense of theft of motor fuel if the person knowingly operates an automobile or other related vehicle after placing motor fuel in the automobile or other related vehicle at a:

(1) Service station, filling station, garage, or other business where motor fuel is offered for sale at retail, so as to cause the automobile or other related vehicle to leave the premises of the service station, filling station, gasoline station, garage, or any other business where motor fuel is offered for sale at retail, with the intent of depriving the owner of the motor fuel and not making payment for the motor fuel; or

(2) Location owned by a political subdivision or nonprofit entity whether or not the motor fuel is offered for sale at retail, so as to cause the automobile or other related vehicle to leave the premises of the political subdivision or nonprofit entity, with the intent of depriving the owner of the motor fuel and not making payment for the motor fuel.

(b) Theft of motor fuel is a Class A misdemeanor.

(c)(1)(A) In addition to a penalty in subsection (b) of this section, a person who pleads guilty or nolo contendere to or is found guilty of theft of motor fuel shall have his or her driver's license suspended by the court for a period of not more than six (6) months.

(B) However, if the person's driver's license has previously been suspended for theft of motor fuel the court shall suspend the person's driver's license for not less than one (1) year.

(2)(A) The court shall immediately take possession of any suspended driver's license and forward it to the Office of Driver Services.

(B) The office shall notify the licensee of the suspension and of an opportunity to request a hearing to determine if a restricted permit should be issued during the time of suspension.

(d) Any service station, filling station, garage, or other location where motor fuel is offered for sale at retail shall prominently display on each face of a retail product dispenser a sign that contains the following: "THEFT OF MOTOR FUEL IS A CLASS A MISDEMEANOR AND CARRIES A MAXIMUM PENALTY OF ONE (1) YEAR IN JAIL, $1000 FINE, AND A ONE (1) YEAR SUSPENSION OF YOUR DRIVER'S LICENSE."

(e) As used in this section:

(1) "Nonprofit entity" means an organization that is exempt from income tax under 26 U.S.C. § 501(a); and

(2) "Political subdivision" means an agency, department, or other governing body of the state.

History. Acts 2001, No. 745, § 2; 2005, No. 900, § 1; 2011, No. 194, § 9.

Amendments. The 2011 amendment deleted "under § 27-16-907(a)" following "the court" in (c)(1)(A).

5-36-123. Theft of scrap metal.

(a) A person commits theft of scrap metal if he or she commits theft of property under § 5-36-103(a) and the property is scrap metal.

(b) Except as provided in subsection (c) of this section, the classification and penalty range for theft of scrap metal is the same as theft of property under § 5-36-103(b).

(c) Upon conviction of a person for theft of scrap metal, the classification and penalty range in § 5-36-103(b) shall be increased one (1) classification if:

(1) The person caused incidental damage to the owner of the scrap metal or the property of the owner of the scrap metal while committing the theft of scrap metal and the costs of incidental damage was more than two hundred fifty dollars ($250); or

(2) The person transported the scrap metal across state lines to sell or dispose of the scrap metal.

(d) As used in this section:

(1) "Costs of incidental damage" means the total amount of money damages suffered by an owner of scrap metal as a direct result of the theft of the scrap metal, including lost income, lost profits, and costs of repair or replacement of property damage;

(2) "Incidental damage" means loss of income, loss of profit, or property damage; and

(3) "Scrap metal" means copper, copper alloy, copper utility wire, any bronze, or any aluminum as described in § 17-44-101 et seq.

History. Acts 2007, No. 630, § 1.

5-36-124. Theft by receiving of scrap metal.

(a) As used in this section:

(1) "Receiving" means acquiring possession, control, or title or lending on the security of the scrap metal; and

(2) "Scrap metal" means copper, copper alloy, copper utility wire, any bronze, or any aluminum as described in § 17-44-101 et seq.

(b) A person commits the offense of theft by receiving of scrap metal if he or she receives, retains, or disposes of scrap metal of another person knowing that the scrap metal was stolen.

(c)(1) Theft by receiving of scrap metal is a:

(A) Class D felony if the value of the scrap metal is more than one thousand dollars ($1,000); or

(B) Class A misdemeanor.

(2) A person who is found guilty of or pleads guilty or nolo contendere to a second or subsequent violation of this section is guilty of a Class D felony.

History. Acts 2011, No. 1193, § 1.

Subchapter 3 — Wireless Services Theft Prevention Law

SECTION.

5-36-303. Theft of wireless service.

(a) A person commits the offense of theft of wireless service if he or she purposely obtains wireless service by the use of an unlawful wireless device or without the consent of the wireless service provider.

(b) Theft of wireless service is a:

(1) Class A misdemeanor if the aggregate value of wireless service obtained is one thousand dollars ($1,000) or less;

(2) Class D felony if the:

(A) Aggregate value of wireless service obtained is five thousand dollars ($5,000) or less but more than one thousand dollars ($1,000); or

(B) Stolen wireless service is used to communicate a threat of damage or injury by bombing, fire, or other means, in a manner likely to:

(i) Place another person in reasonable apprehension of physical injury to himself or herself or another person or of damage to his or her property or to the property of another person; or

(ii) Create a public alarm;

(3) Class C felony if the:

(A) Aggregate value of wireless service is more than five thousand dollars ($5,000) but less than twenty-five thousand dollars ($25,000);

(B) Conviction is for a second or subsequent offense; or

(C) Person convicted of the offense has been previously convicted of any similar crime in this or any other state or federal jurisdiction; or

(4) Class B felony if the aggregate value of the wireless service is twenty-five thousand dollars ($25,000) or more.

History. Acts 1997, No. 1310, § 3; 2003, No. 1087, § 25; 2011, No. 570, § 26.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "Legislative intent. The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Amendments. The 2011 amendment inserted "wireless" in (a), (b)(2)(A), (b)(2)(B) and (a)(3)(A); substituted "purposely" for "intentionally" in (a); substituted "one thousand dollars ($1,000)" for "five hundred dollars ($500)" in (b)(1); substituted "Class D" for "Class C" in the introductory paragraph of (b)(2); rewrote (b)(2)(A); substituted "Class C" for "Class B" in the introductory paragraph of (b)(3); rewrote (b)(3)(A); and added (b)(4).

CHAPTER 37

FORGERY AND FRAUDULENT PRACTICES

SUBCHAPTER.

Subchapter 1 — General Provisions

5-37-101. Definitions.

CASE NOTES

Utter.

In a first-degree forgery conviction, there was substantial evidence establishing that defendant acted with intent where he repeatedly tried to pass counterfeit bills at local businesses and offered an individual one of his bills in exchange for twenty dollars. Taylor v. State, 94 Ark. App. 21, 223 S.W.3d 80 (2006).

Subchapter 2 — Offenses Generally

A.C.R.C. Notes. For codification of Acts 2011, No. 697, § 1, see § 5-37-216.

Effective Dates. Acts 2011, No. 172, § 2: Mar. 4, 2011. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the filing of false liens by persons for vengeful reasons has become a large problem in these United States; that currently Arkansas has inadequate statutes to address this growing problem; and that this act is immediately necessary because citizens as well as persons engaged in law enforcement and the judiciary need immediate protection. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

5-37-201. Forgery.

(a) A person forges a written instrument if, with purpose to defraud, the person makes, completes, alters, counterfeits, possesses, or utters any written instrument that purports to be or is calculated to become or to represent if completed the act of a person who did not authorize that act.

(b) A person commits forgery in the first degree if he or she forges a written instrument that is:

(1) Money, a security, a postage or revenue stamp, or other instrument issued by a government; or

(2) A stock, bond, or similar instrument representing an interest in property or a claim against a corporation or its property.

(c) A person commits forgery in the second degree if he or she forges a written instrument that is:

(1) A deed, will, codicil, contract, assignment, check, commercial instrument, credit card, or other written instrument that does or may evidence, create, transfer, terminate, or otherwise affect a legal right, interest, obligation, or status;

(2) A public record, or an instrument filed or required by law to be filed, or an instrument legally entitled to be filed in a public office or with a public servant; or

(3) A written instrument officially issued or created by a public office, public servant, or government agent.

(d) Forgery in the first degree is a Class B felony.

(e) Forgery in the second degree is a Class C felony.

History. Acts 1975, No. 280, § 2302; A.S.A. 1947, § 41-2302.

Publisher's Notes. This section is being set out to reflect the insertion of "the person" preceding "makes" in (a).

CASE NOTES

Analysis

Applicability.
Evidence.
Sentence.

Applicability.

Plaintiffs pleaded a facially plausible claim under § 16-118-107 where they alleged that the January patient notification letter defendants sent out could reasonably be construed as representing that plaintiffs were abandoning their patients or that defendants were terminating the physician-patient relationship between plaintiffs and the office's patients, the letter arguably constituted a written instrument that did or may have evidenced, created, transferred, terminated, or otherwise affected a legal right, interest, obligation, or status under this section. Murphy v. LCA-Vision, Inc., — F. Supp. 2d —, 2011 U.S. Dist. LEXIS 22156 (E.D. Ark. Mar. 4, 2011).

Evidence.

Evidence was sufficient to sustain a forgery conviction where defendant made a statement to the police admitting that he had been engaged in a forgery scheme and that his price for forged checks varied according to the amount of the check. Dendy v. State, 93 Ark. App. 281, 218 S.W.3d 322 (2005).

In a first-degree forgery conviction, there was substantial evidence establishing that defendant acted with intent where he (1) repeatedly tried to pass counterfeit bills at local businesses and (2) offered an individual one of his bills in exchange for twenty dollars. Taylor v. State, 94 Ark. App. 21, 223 S.W.3d 80 (2006).

Evidence was sufficient to sustain defendant's forgery and theft convictions where she did not offer a reasonable explanation of how she acquired the forged check; therefore, an inference that she committed the forgery or was an accessory to its commission was warranted and the court did not err in inferring defendant's intent. DeShazer v. State, 94 Ark. App. 363, 230 S.W.3d 285 (2006).

Where the state failed to prove that the check was issued or presented for payment prior to the closure of the bank account upon which it was drawn, the trial court could not reasonably infer that the check was forged; therefore, the trial court erred in finding that defendant violated the terms of her probation by pass-

ing a forged instrument. Bedford v. State, 96 Ark. App. 38, 237 S.W.3d 516 (2006).

There was sufficient evidence to support appellants' convictions for second-degree forgery where appellants possessed not only checks bearing the names of the victims, but also a credit card and driver's license in one victim's name, the license bearing one of appellant's picture. Stephens v. State, 2009 Ark. App. 804, — S.W.3d — (2009).

Evidence that defendant had the victim's credit card and driver's license and that he attempted to cash a forged check was sufficient to support his convictions for theft by receiving under § 5-36-106 and forgery under this section. Suggs v. State, 2010 Ark. App. 571, — S.W.3d — (2010).

Sentence.

Revocation of a defendant's probation on an underlying charge of forgery in the second degree was supported by a preponderance of the evidence: defendant admitted to more than one violation of defendant's probation and a judge was not required to believe defendant's explanations or excuse defendant's failure to comply with the conditions of defendant's probation. Ingram v. State, 2009 Ark. App. 729, — S.W.3d — (2009).

5-37-203. Defrauding a secured creditor.

(a)(1) A person commits the offense of defrauding a secured creditor in the first degree if he or she destroys, removes, cancels, encumbers, transfers, or otherwise disposes of property subject to a security interest with the purpose to hinder enforcement of the security interest.

(2) Defrauding a secured creditor in the first degree is a Class D felony.

(b)(1) A person commits the offense of defrauding a secured creditor in the second degree if he or she uses motor vehicle insurance policy proceeds in excess of one thousand dollars ($1,000) obtained from a settlement of a property damage claim on a motor vehicle subject to a security interest in contravention of the security agreement that creates or provides for the security interest in the motor vehicle.

(2) Defrauding a secured creditor in the second degree is a Class A misdemeanor.

History. Acts 1975, No. 280, § 2304; A.S.A. 1947, § 41-2304; Acts 2009, No. 485, § 1.

Amendments. The 2009 amendment inserted (b), redesignated former (a) and (b) as (a)(1) and (a)(2), and inserted "in the first degree" in (a)(1) and (a)(2).

5-37-207. Fraudulent use of a credit card or debit card.

(a) A person commits the offense of fraudulent use of a credit card or debit card, if with purpose to defraud, he or she uses a credit card, credit card account number, debit card, or debit card account number to obtain property or a service with knowledge that:

(1) The credit card, credit card account number, debit card, or debit card account number is stolen;

(2) The credit card, credit card account number, debit card, or debit card account number has been revoked or cancelled;

(3) The credit card, credit card account number, debit card, or debit card account number is forged; or

(4) For any other reason his or her use of the credit card, credit card account number, debit card, or debit card account number is unautho-

rized by either the issuer or the person to whom the credit card or debit card is issued.

(b) Fraudulent use of a credit card or debit card is a:

(1) Class B felony if the value of all moneys, goods, or services obtained during any six-month period is twenty five thousand dollars ($25,000) or more;

(2) Class C felony if the value of all moneys, goods, or services obtained during any six-month period is less than twenty five thousand dollars ($25,000) but more than five thousand dollars ($5,000);

(3) Class D felony if the value of all moneys, goods, or services obtained during any six-month period is five thousand dollars ($5,000) or less but more than one thousand dollars ($1,000); or

(4) Class A misdemeanor if the value of all moneys, goods, or services obtained during any six-month period is one thousand dollars ($1,000) or less.

History. Acts 1975, No. 280, § 2308; A.S.A. 1947, § 41-2308; Acts 1997, No. 516, § 4; 2001, No. 1142, § 1; 2011, No. 570, § 27.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "Legislative intent. The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Amendments. The 2011 amendment rewrote (b)(1) and (b)(2); and added (b)(3) and (b)(4).

CASE NOTES

Evidence.

Evidence was sufficient to support a conviction for fraudulent use of a credit card under this section where company representatives stated that defendant was not authorized to use the card, and defendant made inconsistent statements as to why he was purchasing gasoline with the card. The fact that defendant paid for the gasoline himself did not erase his attempt to use the card. Lee v. State, 102 Ark. App. 23, 279 S.W.3d 496 (2008).

While defendant worked for the sheriff's department, she was authorized to use the department's credit card only for county purchases; her use of the card for personal purchases was sufficient to support her conviction for fraudulently using a credit card in violation of subdivision (a)(4) of this section. Baker v. State, 2009 Ark. App. 788, — S.W.3d — (2009).

5-37-215. Fraudulently filing a Uniform Commercial Code financing statement.

(a) As used in this section:

(1) "Financing statement" means the same as defined in § 4-9-102(a)(39); and

(2) "Security agreement" means the same as defined in § 4-9-102(a)(74).

(b) A person commits the offense of fraudulently filing a Uniform Commercial Code financing statement if, with the purpose to defraud or harass an alleged debtor or any other person, the person knowingly presents or conspires with another person to present a financing

statement under the Uniform Commercial Code § 4-1-101 et seq., for filing that the person knows:

(1) Is not based on a bona fide security agreement; or

(2) Was not authorized or authenticated by the alleged debtor identified in the financing statement or an authorized representative of the alleged debtor.

(c)(1) Fraudulently filing a Uniform Commercial Code financing statement is a Class A misdemeanor.

(2)(A) A subsequent offense of fraudulently filing a Uniform Commercial Code financing statement is a Class D felony.

(B)(i) Subdivision (c)(2)(A) of this section includes a subsequent offense by a defendant who has previously pleaded guilty or nolo contendere to or been found guilty of an equivalent penal law of another state or foreign jurisdiction or an equivalent penal federal law.

(ii) The trial judge shall determine whether the defendant has previously pleaded guilty or nolo contendere to or been found guilty of an equivalent penal law in another state or foreign jurisdiction or an equivalent penal federal law based on certified records of the previous offense.

(d) In addition to the criminal penalties provided under subsection (c) of this section and in addition to any other laws under which a person may obtain relief, a person aggrieved or damaged by the filing of a Uniform Commercial Code financing statement in violation of subsection (b) of this section has a civil cause of action against the defendant for injunctive and other curative relief and may also recover:

(1) The greater of ten thousand dollars ($10,000) or the actual damages caused by the violation;

(2) Court costs;

(3) Reasonable attorney's fees;

(4) Costs and expenses reasonably related to the expenses of investigating and bringing the civil action; and

(5) Exemplary or punitive damages in an amount determined by the fact finder.

History. Acts 2009, No. 336, § 1.

5-37-216. Defrauding a prospective adoptive parent.

(a) As used in this section:

(1) "Aggregate financial benefit" means the total financial benefit received by a person preceding, during, and after the pregnancy of the person;

(2) "Financial benefit" means any cost for prenatal, delivery, or postnatal care, including without limitation reasonable costs for:

(A) Housing;

(B) Food;

(C) Clothing;

(D) Medical expenses; or

(E) General maintenance; and

(3) "Prospective adoptive parent" means a person who through his or her actions has a stated or unstated intention to begin the process of adopting a minor, whether or not the minor is known to him or her.

(b) A person commits the offense of defrauding a prospective adoptive parent if he or she:

(1) Knowingly obtains a financial benefit from a prospective adoptive parent or from an agent of a prospective adoptive parent with a purpose to defraud the prospective adoptive parent or the agent of the prospective adoptive parent of the financial benefit; and

(2) Does not:

(A) Consent to the adoption; or

(B) Complete the adoption process.

(c) Defrauding a prospective adoptive parent is a:

(1) Class B felony if:

(A) The aggregate financial benefit is two thousand five hundred dollars ($2,500) or more; or

(B) The person has previously been convicted under this section;

(2) Class C felony if the aggregate financial benefit is five hundred dollars ($500) or more but less than two thousand five hundred dollars ($2,500); or

(3) Class A misdemeanor if the aggregate financial benefit is less than five hundred dollars ($500).

History. Acts 2011, No. 697, § 1.

A.C.R.C. Notes. Acts 2011, No. 697, § 1, created a new offense at § 5-26-204. However, pursuant to § 1-2-303, the section was redesignated as § 5-37-216.

5-37-225. Use of false transcript, diploma, or grade report from postsecondary educational institution.

(a) No person may falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged, or counterfeited, or knowingly aid or assist in falsely making, forging, or counterfeiting a transcript, diploma, or grade report of a postsecondary educational institution.

(b) No person may use, offer, or present as genuine a false, forged, counterfeited, or altered transcript, diploma, or grade report of a postsecondary educational institution.

(c) No person may use, offer, or present a transcript, diploma, or grade report of a postsecondary educational institution in a fraudulent manner.

(d) A person who violates any provision of this section is guilty of a Class A misdemeanor.

History. Acts 1991, No. 351, §§ 1, 2; 2005, No. 1994, § 345; 2007, No. 827, § 40.

Amendments. The 2007 amendment substituted "knowingly" for "willingly" in (a).

5-37-226. Filing instruments affecting title or interest in real property.

(a) It is unlawful for a person with the knowledge of the instrument's lack of authenticity or genuineness to have placed of record in the office of the county recorder or the office of the Secretary of State any instrument:

(1) Clouding or adversely affecting:

(A) The title or interest of the true owner, lessee, or assignee in real property; or

(B) Any bona fide interest in real property; and

(2) With the purpose of:

(A) Clouding, adversely affecting, impairing, or discrediting the title or other interest in the real property which may prevent the true owner, lessee, or assignee from disposing of the real property or transferring or granting any interest in the real property; or

(B) Procuring money or value from the true owner, lessee, or assignee to clear the instrument from the records of the office of the county recorder or the office of the Secretary of State.

(b)(1)(A) A person who violates subsection (a) of this section is guilty of a Class A misdemeanor.

(B) A person who has a previous conviction under subdivision (b)(1)(A) of this section upon conviction is guilty of a Class D felony for a subsequent violation of subsection (a) of this section.

(2) However, a person who violates subsection (a) of this section is guilty of a Class C felony if the person violates subsection (a) of this section because of the performance of official duties by the victim and the victim is:

(A) A judge or other court personnel;

(B) A prosecuting attorney or deputy prosecuting attorney;

(C) A state, county, or municipal law enforcement officer or jailer;

(D) An employee of the Department of Correction;

(E) An employee of the Department of Community Correction;

(F) A judge, prosecuting attorney, deputy prosecuting attorney, law enforcement officer, or jailer from another state, the District of Columbia, the Commonwealth of Puerto Rico, or a territory of the United States;

(G) A person elected to a federal, state, or local position; or

(H) A person employed by the Attorney General.

(c) An owner, lessee, or assignee of real property located in the State of Arkansas who suffers loss or damages as a result of conduct that is prohibited under subsection (a) of this section and who must bring civil action to remove any cloud from his or her title or interest in the real property or to clear his or her title or interest in the real property is entitled to three (3) times actual damages, punitive damages, and costs, including any reasonable attorney's fees or other costs of litigation reasonably incurred.

(d) This section does not apply to a bona fide filing of lis pendens, materialmen's lien, laborer's lien, or other legitimate notice or protective filing as provided by law.

History. Acts 1995, No. 1086, §§ 1-3; 2011, No. 172, § 1.

Amendments. The 2011 amendment substituted "county recorder or the office of the Secretary of State" for "recorder of any county" in the introductory language of (a); substituted "purpose" for "intent" in the introductory language of (a)(2); in (a)(2)(B), inserted "county" and "or the office of the Secretary of State"; inserted (b)(1)(B) and (b)(2).

CASE NOTES

Analysis

In General.
Equitable Relief.
Evidence.

In General.

Property owners who failed to make mortgage payments in apparent confusion over unmade withdrawals from their checking account failed to state a claim for relief against the loan servicing agent, which had not violated this section in filing a bona fide foreclosure action. Quinn v. Ocwen Fed. Bank FSB, 470 F.3d 1240 (8th Cir. 2006).

Equitable Relief.

As lessors suit the lessee, alleging it violated this section and § 15-73-204, and attacking the validity of the lease, they could not thereafter complain that the lessee failed to fulfill its lease obligations. Therefore, the lessee's was entitled to equitable relief by being allowed to suspend its drilling obligations while the suit was pending. Snowden v. JRE Invs., 2010 Ark. 276, — S.W.3d — (2010).

Evidence.

Where the owner of a construction company testified that the company had performed work on the project on June 23, 2003, and on unspecified dates in August 2003, and the lien was filed on October 20, 2003, substantial evidence existed to find that the company did not filed its lien with knowledge that it had not worked on the project within 120 days before the lien was filed. Swink v. Lasiter Constr., Inc., 94 Ark. App. 262, 229 S.W.3d 553 (2006).

Trial court did not err in awarding an individual punitive damages and attorney fees under subsection (c) of this section, and although the trial court did not make a finding that the instrument was filed with knowledge that it was not genuine or authentic, such a finding was implicit when the court awarded punitive damages under the statute, and the findings were supported by the evidence that the company prepared quitclaim deeds to the entire 40 acres, despite one acre having been carved out, the company was a shell company, and there were no revenue stamps on the deeds under § 26-60-110(b), and the letter attached to the individual's complaint implied that the company was seeking money from the individual in order to clear his title; because the award was based on a statutory remedy, the trial court could have awarded punitive damages without first having awarded compensatory damages. J. Michael Enters. v. Oliver, 101 Ark. App. 48, 270 S.W.3d 388 (2007), review denied, — Ark. —, — S.W.3d —, 2008 Ark. LEXIS 272 (Apr. 24, 2008).

5-37-227. Financial identity fraud — Nonfinancial identity fraud — Restitution — Venue.

(a) A person commits financial identity fraud if, with the purpose to:

(1) Create, obtain, or open a credit account, debit account, or other financial resource for his or her benefit or for the benefit of a third party, he or she accesses, obtains, records, or submits to a financial institution another person's identifying information for the purpose of opening or

creating a credit account, debit account, or financial resource without the authorization of the person identified by the information; or

(2) Appropriate a financial resource of another person to his or her own use or to the use of a third party without the authorization of that other person, the actor:

(A) Uses a scanning device; or

(B) Uses a re-encoder.

(b) A person commits nonfinancial identity fraud if he or she knowingly obtains another person's identifying information without the other person's authorization and uses the identifying information for any unlawful purpose, including without limitation:

(1) To avoid apprehension or criminal prosecution;

(2) To harass another person; or

(3) To obtain or to attempt to obtain a good, service, real property, or medical information of another person.

(c) As used in this section:

(1) "Disabled person" means the same as defined in § 4-88-201;

(2) "Elder person" means the same as defined in § 4-88-201;

(3) "Financial institution" includes, but is not limited to, a credit card company, bank, or any other type of lending or credit company or institution;

(4) "Financial resource" includes, but is not limited to, a credit card, debit card, or any other type of line of credit or loan;

(5) "Identifying information" includes, but is not limited to, a:

(A) Social security number;

(B) Driver's license number;

(C) Checking account number;

(D) Savings account number;

(E) Credit card number;

(F) Debit card number;

(G) Personal identification number;

(H) Electronic identification number;

(I) Digital signature; or

(J) Any other number or information that can be used to access a person's financial resources;

(6) "Re-encoder" means an electronic device that places encoded information from the magnetic strip or stripe of a payment card onto the magnetic strip or stripe of a different card; and

(7) "Scanning device" means a scanner, reader, or any other electronic device that is used to access, read, scan, obtain, memorize, or store, temporarily or permanently, information encoded on the magnetic strip or stripe of a payment card.

(d) The provisions of this section do not apply to any person who obtains another person's driver's license or other form of identification for the sole purpose of misrepresenting the actor's age.

(e)(1) Except as provided in subdivision (e)(2) of this section, financial identity fraud is a Class C felony.

(2) Financial identify fraud is a Class B felony if the victim is an elder person or a disabled person.

(f)(1) Except as provided in subdivision (f)(2) of this section, nonfinancial identity fraud is a Class D felony.

(2) Nonfinancial identity fraud is a Class C felony if the victim is an elder person or a disabled person.

(g)(1) In addition to any penalty imposed under this section, a violation of this section constitutes an unfair or deceptive act or practice as defined by the Deceptive Trade Practices Act, § 4-88-101 et seq.

(2) Any remedy, penalty, or authority granted to the Attorney General or another person under the Deceptive Trade Practices Act, § 4-88-101 et seq., is available to the Attorney General or that other person for the enforcement of this section.

(h)(1)(A) In addition to any penalty imposed under this section, upon conviction for financial identity fraud or nonfinancial identity fraud, a court may order the defendant to make restitution to any victim whose identifying information was appropriated or to the estate of the victim under § 5-4-205.

(B) In addition to any other authorized restitution, the restitution order described in subdivision (h)(1)(A) of this section may include without limitation restitution for the following financial losses:

(i) Any costs incurred by the victim in correcting the credit history or credit rating of the victim; and

(ii) Any costs incurred in connection with any civil or administrative proceeding to satisfy any debt, lien, or other obligation resulting from the theft of the victim's identifying information, including lost wages and attorney's fees.

(C) The court also may order restitution for financial loss to any other person or entity that suffers a financial loss from a violation of subsection (a) or (b) of this section.

(2) A judgment entered under this section and § 5-4-205 does not bar a remedy available in a civil action to recover damages relating to financial identity fraud or nonfinancial identity fraud.

(i) Venue for any criminal prosecution under this section or any civil action to recover damages relating to financial identity fraud or nonfinancial identity fraud is proper in any of the following venues:

(1) In the county where the violation occurred;

(2) If the violation was committed in more than one (1) county, or if the elements of the offense were committed in more than one (1) county, then in any county where any violation occurred or where an element of the offense occurred;

(3) In the county where the victim resides; or

(4) In the county where property that was fraudulently used or attempted to be used was located at the time of the violation.

History. Acts 1999, No. 568, § 1; 1999, No. 1578, § 1; 2005, No. 280, § 1; 2005, No. 1018, § 1; 2007, No. 85, § 1; 2009, No. 748, § 20.

Amendments. The 2007 amendment added "Nonfinancial identity fraud — Restitution — Venue" to the end of the section heading; inserted present (b), (e), (f), (h) and (i) and redesignated the remaining subsections accordingly; inserted present (c)(1) and (2) and redesignated the remaining subdivisions accordingly;

added (e)(2); added "Except as provided in subdivision (e)(2) of this section" to the beginning of (e)(1); and added "In addition to any penalty imposed under this section" to the beginning of (g)(1).

The 2009 amendment substituted "purpose" for "intent" in the introductory language of (a).

5-37-228. Identity theft passport.

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Survey of Legislation, 2005 Arkansas General Assembly, Criminal Law, 28 U. Ark. Little Rock L. Rev. 335.

Subchapter 3 — Worthless Checks

5-37-301. Title.

This subchapter shall be known and may be cited as the "Arkansas Hot Check Law".

History. Acts 1959, No. 241, § 1; A.S.A. 1947, § 67-719; Acts 2009, No. 748, § 21.

Amendments. The 2009 amendment rewrote the section.

CASE NOTES

Sentencing.

Upon the revocation of defendant's probation for eight violations of the Arkansas Hot Check Law under this section, the trial court was authorized under subdivision (d)(2) of this section and § 5-4-309(f)(1)(A) to modify the original order and impose multiple sentences of imprisonment to be served consecutively in accordance with § 5-4-403(a). The trial court did not err by sentencing defendant to twenty years in prison each on four hot-check counts to run consecutively and ten years in prison each on the other felony hot-check counts to run concurrently. Maldonado v. State, 2009 Ark. 432, — S.W.3d — (2009).

5-37-303. Notice.

(a) For purposes of this section and § 5-37-304, notice that payment was refused by the drawee for lack of funds shall be sent by certified mail, registered mail evidenced by return receipt, or by regular mail supported by an affidavit of mailing, to the address printed on the instrument or given at the time of issuance or to the current residence.

(b)(1) The form of the notice under subsection (a) of this section shall be substantially as follows:

"You are hereby notified that the check(s) or instrument(s) listed below (has) (have) been dishonored. Pursuant to Arkansas law, you have ten (10) days from receipt of this notice to tender payment of the total amount of the check(s) or instrument(s), plus the applicable

service charge(s) of $ _____ (not to exceed $30.00 per check), plus the amount of any fees charged by any financial institution as a result of the check's not being honored, the total amount due being $ _____. Unless this amount is paid in full within the time specified above, the dishonored check(s) or instrument(s) and all other available information relating to this incident may be turned over to the prosecuting attorney for criminal prosecution.

CHECK NO.	CHECK DATE	CHECK AMOUNT	NAME OF BANK
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____".

(2) If notice is sent by an affidavit of mailing, the affidavit of mailing shall contain a copy of the notice and shall substantially state:

"Affidavit of Mailing

I am over the age of eighteen (18) years and on _____ (date), I mailed notice of insufficient funds under Arkansas Code § 5-37-303 to the addressee set forth below in an official depository under the exclusive care and custody of the United States Postal Service in _____ (city, county, state), addressed as follows:

_____

(name and address of addressee).

_____ (Signature)

_____ (Date)

(Notary)

_____".

(c) Any party holding a dishonored check or instrument and giving notice in substantially similar form to that provided in subsection (b) of this section and in the manner provided in subsection (a) of this section is immune from civil liability and criminal liability if sent in good faith for the giving of the notice and for proceeding under the forms of the notice.

History. Acts 1959, No. 241, § 4; 1981, No. 899, § 3; 1983, No. 473, § 1; A.S.A. 1947, § 67-722; Acts 1987, No. 678, § 1; 1992 (1st Ex. Sess.), No. 44, § 1; 1995, No. 335, § 2; 2001, No. 996, § 2; 2003, No. 1732, § 1; 2011, No. 1012, § 2.

Amendments. The 2011 amendment, in (b)(1), inserted "under subsection (a) of this section" and substituted "$30.00" for "$25.00."

5-37-304. Evidence against maker or drawer.

(a) For purposes of this section, it is prima facie evidence that the maker or drawer intended to defraud and knew at the time of the making, drawing, uttering, or delivering that the check, draft, order, or

other form of presentment involving transmission of account information would not be honored if:

(1) The maker or drawer had no account with the drawee at the time the check, draft, order, or other form of presentment involving transmission of account information was made, drawn, uttered, or delivered;

(2) The check, draft, order, or other form of presentment involving transmission of account information bears the endorsement or stamp of a collecting bank indicating that the instrument or transmission was returned or otherwise dishonored because of insufficient funds to cover the value; or

(3) Payment was refused by the drawee for lack of funds, upon presentation within thirty (30) days after delivery, and the maker or drawer has not paid the holder the amount due, together with a service charge not to exceed thirty dollars ($30.00), plus the amount of any fees charged to the holder of the check, draft, order, or other form of presentment involving transmission of account information by a financial institution as a result of the check, draft, order, or other form of presentment involving transmission of account information not being honored, within ten (10) days after receiving written notice that payment was refused upon the check, draft, order, or other form of presentment involving transmission of account information.

(b)(1) Nothing impairs the prosecuting attorney's power to immediately file charges after the check has been returned.

(2) The prosecuting attorney may collect restitution, including a service charge, not exceeding thirty dollars ($30.00) per check, plus the amount of any fees charged to the holder of the check by a financial institution as a result of the check's not being honored, for the payees of the check.

(c) The check, draft, or order bearing an "insufficient" stamp or "no account" stamp from the collecting bank or any other report or stamp from the collecting bank indicating that the check, draft, order, or other form of presentment involving the transmission of account information was dishonored or unable to be paid due to insufficient funds on deposit to cover the value of the check, draft, order, or other form of presentment involving the transmission of account information shall be received as evidence that there were insufficient funds or no account at trial in any court in this state.

(d) Nothing in this section is deemed to abrogate a defendant's right of cross-examination of a banking official if notice of intention to cross-examine is given ten (10) days prior to the date of hearing or trial.

History. Acts 1959, No. 241, § 4; 1981, No. 899, § 3; 1983, No. 473, § 1; A.S.A. 1947, § 67-722; Acts 1987, No. 678, § 1; 1992 (1st Ex. Sess.), No. 44, § 2; 1995, No. 335, § 3; 2001, No. 996, § 3; 2001, No. 1466, § 2; 2011, No. 1012, §§ 3, 4.

Amendments. The 2011 amendment rewrote (a)(3); and substituted "thirty dollars ($30.00)" for "twenty-five dollars ($25.00)" in (b)(2).

5-37-305. Penalties.

(a) Upon a determination of guilt of a person under § 5-37-302, in the event that the order, draft, check, or other form of presentment involving the transmission of account information is one thousand dollars ($1,000) or less, the penalties shall be as follows:

(1) For a first offense, the person is guilty of an unclassified misdemeanor and shall receive a fine of not less than fifty dollars ($50.00) nor more than five hundred dollars ($500) or imprisonment in the county jail or regional detention facility not to exceed thirty (30) days, or both;

(2) For a second offense, the person is guilty of an unclassified misdemeanor and shall receive a fine of not less than one hundred dollars ($100) nor more than one thousand dollars ($1,000) or imprisonment in the county jail or regional detention facility not to exceed ninety (90) days, or both; and

(3) For a third or subsequent offense, the person is guilty of an unclassified misdemeanor and shall receive a fine of not less than two hundred dollars ($200) nor more than two thousand dollars ($2,000) or imprisonment in the county jail or regional detention facility not to exceed one (1) year, or both.

(b)(1) Making, uttering, or delivering one (1) or more instruments or transactions drawn on insufficient funds or drawn on a nonexistent account is a Class B felony if:

(A) The amount of any one (1) instrument or transaction is twenty-five thousand dollars ($25,000) or more; or

(B) More than one (1) instrument or transaction has been drawn within a ninety-day period, each instrument or transaction is in an amount less than twenty-five thousand dollars ($25,000), and the total amount of all such instruments or transactions is twenty-five thousand dollars ($25,000) or more.

(2) Making, uttering, or delivering one (1) or more instruments or transactions drawn on insufficient funds or drawn on nonexistent accounts is a Class C felony if:

(A) The amount of any one (1) instrument or transaction is less than twenty-five thousand dollars ($25,000) but more than five thousand dollars ($5,000); or

(B) More than one (1) instrument or transaction has been drawn within a ninety-day period, each instrument or transaction is in an amount less than twenty-five thousand dollars ($25,000) but more than five thousand dollars ($5,000), and the total amount of all such instruments or transactions is less than twenty-five thousand dollars ($25,000) but more than five thousand dollars ($5,000).

(3) Making, uttering, or delivering one (1) or more instruments or transactions drawn on insufficient funds or drawn on nonexistent accounts is a Class D felony if:

(A) The amount of any one (1) instrument or transaction is five thousand dollars ($5,000) or less but more than one thousand dollars ($1,000); or

(B) More than one (1) instrument or transaction has been drawn within a ninety-day period, each instrument or transaction is in an amount of five thousand dollars ($5,000) or less but more than one thousand dollars ($1,000), and the total amount of all such instruments or transactions is five thousand dollars ($5,000) or less but more than one thousand dollars ($1,000).

(4) Making, uttering, or delivering one (1) or more instruments or transactions drawn on insufficient funds or drawn on nonexistent accounts is a Class A misdemeanor if:

(A) The amount of any one (1) instrument or transaction is one thousand dollars ($1,000) or less; or

(B) More than one (1) instrument or transaction has been drawn within a ninety-day period, each instrument or transaction is in an amount of one thousand dollars ($1,000) or less, and the total amount of all such instruments or transactions is one thousand dollars ($1,000) or less.

(5) Under subdivisions (b)(1)(B) and (b)(2)(B) of this section, each instrument or transaction may be added together in a single prosecution.

(c)(1) Any court passing sentence upon a person convicted of any offense under §§ 5-37-301 — 5-37-306 may also order the person to make full restitution to the plaintiff or complaining party.

(2) All court costs may be taxed to the convicted defendant.

History. Acts 1959, No. 241, § 5; 1961, No. 500, § 1; 1977, No. 766, § 1; 1981, No. 899, § 5; 1983, No. 473, § 2; 1983, No. 719, § 4; 1985, No. 254, § 1; A.S.A. 1947, § 67-723; Acts 2001, No. 1466, § 3; 2007, No. 632, § 1; 2009, No. 748, § 22; 2011, No. 570, § 28.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "Legislative intent. The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Amendments. The 2007 amendment substituted "five hundred dollars ($500)" for "two hundred dollars ($200)" in (a), (b)(2)(A), and (b)(2))(B).

The 2009 amendment substituted "five hundred dollars ($500)" for "two hundred dollars ($200)" in (b)(2)(B).

The 2011 amendment rewrote the section.

5-37-307. Knowingly issuing worthless check.

(a) A person commits an offense if he or she issues or passes a check, order, draft, or any other form of presentment involving the transmission of account information for the payment of money knowing that the issuer does not have sufficient funds in or on deposit with the bank or other drawee for the payment in full of the check, order, draft, or any other form of presentment involving the transmission of account information, as well as any other check, order, draft, or any other form of presentment involving the transmission of account information outstanding at the time of issuance.

(b)(1) This section and § 21-6-411 do not apply to a preexisting debt or a situation in which nothing of value was acquired.

(2) However, this section and § 21-6-411 do apply to a payment of rent, child support, consignment, tax, license, fee, fine, and court costs.

(c)(1) This section does not prevent the prosecuting attorney from establishing the required knowledge by direct evidence.

(2) However, for purposes of this section, the issuer's knowledge of insufficient funds is presumed, except in the case of a postdated check, order, draft, or any other form of presentment involving the transmission of account information if:

(A) The issuer had no account with the bank or other drawee at the time he or she issued the check, order, draft, or any other form of presentment involving the transmission of account information; or

(B) Payment was refused by the bank or other drawee for lack of funds or insufficient funds on presentation within thirty (30) days after issue and the issuer failed to pay the holder in full, plus a service charge not to exceed thirty dollars ($30.00), plus the amount of any fees charged to the holder of the check by a financial institution as a result of the check's not being honored, within ten (10) days after receiving notice of that refusal.

(d) Notice for purposes of this section shall be by the procedure as set forth in §§ 5-37-303 and 5-37-304.

(e) If notice is given, it is presumed that the notice was received no later than five (5) days after it was sent.

(f) An offense under this section is a violation and is punishable as provided in § 5-4-104.

(g) This act is cumulative to all other acts and shall not repeal any other act.

History. Acts 1985 (1st Ex. Sess.), No. 33, §§ 1, 4; A.S.A. 1947, §§ 67-726, 67-728n; Acts 1987, No. 69, § 2; 1987, No. 678, § 2; 1991, No. 1051, § 2; 1995, No. 335, § 4; 2001, No. 996, § 4; 2001, No. 1466, § 4; 2011, No. 1012, § 5.

Amendments. The 2011 amendment substituted "thirty dollars ($30.00)" for "twenty-five dollars ($25.00)" in (c)(2)(B)

Subchapter 4 — Cable Television

5-37-402. Theft of communication services — Unlawful communication and access devices.

(a) A person commits theft of communication services if he or she knowingly and with the intent to defraud a communication service provider:

(1) Obtains or attempts to obtain or uses a communication service without the authorization of or proper compensation paid to the communication service provider, or assists or instructs any other person in doing so with the intent to defraud the communication service provider;

(2) Tampers with, modifies, or maintains a modification to a communication device installed or provided by the communication service provider with the intent to defraud that communication service provider;

(3) Possesses with the intent to distribute, manufactures, develops, assembles, distributes, transfers, imports into this state, licenses, leases, sells or offers, promotes or advertises for sale, use, or distribution any communication device:

(A) For the commission of a theft of a communication service or to receive, intercept, disrupt, transmit, retransmit, decrypt, or acquire or facilitate the receipt, interception, disruption, transmission, retransmission, decryption, or acquisition of any communication service without the express consent or express authorization of the communication service provider, as stated in a contract or otherwise; or

(B) With the intent to conceal or to assist another to conceal from any communication service provider or from any lawful authority the existence or place of origin or destination of any communication, provided that the concealment is for the purpose of committing a violation of subdivision (a)(3)(A) of this section;

(4) Tampers or otherwise interferes with or connects to by any means, whether mechanical, electrical, acoustical, or other means, any cable, wire, or other device used for the distribution of cable television without authority from the operator of the service, modifies, alters, programs, or reprograms a communication device for a purpose described in subdivision (a)(3) of this section;

(5) Possesses, uses, manufactures, develops, assembles, distributes, imports into this state, licenses, transfers, leases, sells, offers, promotes, or advertises for sale, use, or distribution any unlawful access device; or

(6) Possesses, uses, prepares, distributes, sells, gives, transfers, offers, promotes, or advertises for sale, use, or distribution any:

(A) Plans or instructions for making, assembling, or developing any unlawful access device under circumstances evidencing an intent to use or employ the communication device or unlawful access device, or to allow the communication device or unlawful access device to be used or employed for a purpose prohibited by this subchapter, or knowing or having reason to believe that the communication device or unlawful access device is intended to be so used, or that the plans or instructions are intended to be used for manufacturing or assembling the communication device or unlawful access device for a purpose prohibited by this subchapter; or

(B) Material, including hardware, a cable, a tool, data, computer software, or other information or equipment, knowing that the purchaser or a third person intends to use the material in the manufacture, assembly, or development of a communication device for a purpose prohibited by this subchapter, or for use in the manufacture, assembly, or development of an unlawful access device.

(b)(1) However, nothing in this section shall be construed to prohibit the manufacture, importation, sale, lease, or possession of any television device possessing the internal hardware necessary to receive a cable television signal without the use of a converter, device, or box, or of any television advertised as "cable ready".

(2) A person that manufactures, produces, assembles, designs, sells, distributes, licenses, or develops a multipurpose device is not in violation of this section unless that person acts knowingly and with an intent to defraud a communication service provider and the multipurpose device:

(A) Is manufactured, developed, assembled, produced, designed, distributed, sold, or licensed for the primary purpose of committing a violation of this section;

(B) Has only a limited commercially significant purpose or use other than as an unlawful access device or for the commission of any other violation of this section; or

(C) Is marketed by that person or another person in concert with that person with that person's knowledge for use as an unlawful access device or for the purpose of committing any other violation of this section.

(3) Nothing in this section requires that the design of or design and selection of a part, software code, or component for a communication device provide for a response to any particular technology, device, or software, or any component or part thereof, used by the provider, owner, or licensee of any communication service or of any data, audio or video program, or transmission to protect any such communication, data, audio or video service, program, or transmission from unauthorized receipt, acquisition, interception, access, decryption, disclosure, communication, transmission, or retransmission.

(4) This section does not apply to the following entities or persons when lawfully acting in the capacity listed in this subdivision (b)(4) and as expressly authorized to do so by any other state or federal statute or regulation:

(A) State or local law enforcement agency;

(B) State or local government authority, municipality, or agency; and

(C) Communication service provider.

History. Acts 1985, No. 781, § 2; A.S.A. 1947, § 41-2211; Acts 1997, No. 348, § 1; 2003, No. 1806, § 2.

Publisher's Notes. This section is being set out to update references in (a)(3)(B) and (a)(4).

5-37-407. Additional civil remedies.

(a)(1) In addition to any other provision of this subchapter, any person aggrieved by a violation of this subchapter may bring a civil action in any court of competent jurisdiction.

(2) As used in this section, "any person aggrieved" includes any communication service provider.

(b) The court may:

(1) Award declaratory relief and any other equitable remedy, including a preliminary or final injunction to prevent or restrain a violation of this subchapter, without requiring proof that the plaintiff has suffered or will suffer actual damages or irreparable harm or lacks an adequate remedy at law;

(2) At any time while an action is pending, order the impounding, on such terms as it deems reasonable, of any communication device or unlawful access device that is in the custody or control of the violator and that the court has reasonable cause to believe was involved in the alleged violation of this subchapter;

(3) Award damages as described in subsection (c) of this section;

(4) In the court's discretion, award reasonable attorney fees, costs, and expenses to an aggrieved party who prevails; and

(5) As part of a final judgment or decree finding a violation of this subchapter, order the remedial modification or destruction of any communication device or unlawful access device or any other device or equipment involved in the violation that is in the custody or control of the violator or has been impounded under subdivision (b)(2) of this section.

(c) Damages awarded by a court under this subchapter shall be computed as either of the following:

(1)(A) Upon his or her election of damages at any time before final judgment is entered, the complaining party may recover the actual damages suffered by him or her as a result of the violation of this subchapter and any profits of the violator that are attributable to the violation.

(B) Actual damages include the retail value of any communication service illegally available to a person to whom the violator directly or indirectly provided or distributed any communication device or unlawful access devices.

(C) In proving actual damages, the complaining party shall prove only that the violator manufactured, distributed, or sold any communication device or unlawful access devices.

(D) In determining the violator's profits, the complaining party shall prove only the violator's gross revenue and the violator shall prove his or her deductible expenses; or

(2) Upon election by the complaining party at any time before final judgment is entered, that party may recover in lieu of actual damages, an award of statutory damages of one thousand dollars ($1,000) for each communication device or unlawful access device involved in the action, with the amount of statutory damages to be determined by the court, as the court considers just.

(d) In any case in which the court finds that any violation of this subchapter was committed willfully and for a purpose of commercial advantage or private financial gain, the court in its discretion may increase the total award of any damages under subsection (c) of this section by an amount of not more than fifty thousand dollars ($50,000)

for each communication device or unlawful access device involved in the action or for each day the defendant was in violation of this subchapter.

History. Acts 2003, No. 1806, § 6; 2007, No. 827, § 41.

Amendments. The 2007 amendment inserted "As used in this section" in (a)(2), and made related changes.

CHAPTER 38

DAMAGE OR DESTRUCTION OF PROPERTY

SUBCHAPTER.

Subchapter 2 — Offenses Generally

SECTION.

5-38-203. Criminal mischief in the first degree.

(a) A person commits the offense of criminal mischief in the first degree if he or she purposely and without legal justification destroys or causes damage to any:

(1) Property of another; or

(2) Property, whether his or her own or property of another, for the purpose of collecting any insurance for the property.

(b) Criminal mischief in the first degree is a:

(1) Class Class A misdemeanor if the amount of actual damage is one thousand dollars ($1,000) or less;

(2) Class D felony if the amount of actual damage is more than one thousand dollars ($1,000) but five thousand dollars ($5,000) or less;

(3) Class C felony if the amount of actual damage is more than five thousand dollars ($5,000) but less than twenty-five thousand dollars ($25,000); or

(4) Class B felony if the amount of actual damage is twenty-five thousand dollars ($25,000) or more.

(c) In an action under this section involving cutting and removing timber from the property of another person:

(1) The following create a presumption of a purpose to commit the offense of criminal mischief in the first degree:

(A) The failure to obtain the survey as required by § 15-32-101; or

(B) The purposeful misrepresentation of the ownership or origin of the timber; and

(2)(A) There is imposed in addition to a penalty in subsection (b) of this section a fine of not more than two (2) times the value of the timber destroyed or damaged.

(B) However, in addition to subdivision (c)(2)(A) of this section, the court may require the defendant to make restitution to the owner of the timber.

History. Acts 1975, No. 280, § 1906; 1977, No. 360, § 7; 1981, No. 544, § 2; 1981, No. 671, § 1; A.S.A. 1947, § 41-1906; Acts 1988 (3rd Ex. Sess.), No. 13, § 1; 1995, No. 1296, § 5; 1997, No. 448, § 1; 2005, No. 1994, § 443; 2011, No. 570, § 29.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "Legislative intent. The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Amendments. The 2011 amendment rewrote (b)(1) and (b)(2); and added (b)(3) and (b)(4).

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Annual Survey of Case Law: Criminal Law, 29 U. Ark. Little Rock L. Rev. 849.

CASE NOTES

Analysis

Evidence.
Timber.

Evidence.

Substantial evidence supported defendant's convictions for commercial burglary, criminal mischief, and breaking and entering because the testimony of defendant's accomplice, who was defendant's son, was sufficiently corroborated, as required by § 16-89-111(e)(1), by an officer's testimony as to the items he found in defendant's truck, matching the description of items stolen from a convenience store. The accomplice admitted that he and defendant entered the store by using a cable to pull open the front doors and that he and defendant used bolt cutters and a pry bar to break into gaming machines, and these items, along with packages of cigarettes stolen from the store, were found by police officers in defendant's truck. Dunlap v. State, 2010 Ark. App. 582, — S.W.3d — (2010).

Defendant's conviction for first-degree criminal mischief under subdivision (a)(1) of this section was supported by substantial evidence as: (1) it was fair to presume that defendant purposely for § 5-2-202(1) purposes broke a former supervisor's car windows when defendant repeatedly swung a long, heavy metal object at them; (2) defendant's statement to the supervisor immediately prior to smashing the supervisor's windows that defendant should "kick (the supervisor's) ass" demonstrated defendant's anger and indicated a desire to express that anger with violence; and (3) defendant failed to support a claim that defendant's actions were justified. Warren v. State, 2011 Ark. App. 102, — S.W.3d — (2011).

Timber.

Evidence was sufficient to sustain a first-degree criminal mischief conviction where defendant used a bulldozer to make roads throughout the owner's property, logged the entire 300 acres of its timber, and the jury was not obligated to believe that defendant was acting under what he believed was the owner's consent. Jester v. State, 367 Ark. 249, 239 S.W.3d 484 (2006).

In a criminal mischief case, the court properly ordered defendant to pay $180,000 in restitution as the land owner estimated his timber loss to be about $180,000 in his complaint that he filed with the Arkansas Forestry Commission, which was introduced into evidence at trial; further, his expert estimated that

the remaining property value was worth $150,000, and defendant himself offered the owner $180,000 for the property in hopes to settle the dispute. Jester v. State, 367 Ark. 249, 239 S.W.3d 484 (2006).

Trial court did not err in denying appellants a new trial or remittitur regarding a punitive damage award in favor of appellees, as the award was not in excess of federal due process standards, given that (1) appellees suffered economic harm, but the harm was much more than purely economic injury, as appellants cut down approximately 40 percent of appellees' future retirement homesite and the privacy afforded by the trees was very important to appellees, (2) appellants' action forced appellees to give up their plans to retire to the property and ultimately sell it, (3) the tree cutting was intentional and not an isolated incident, (4) the profit appellants received from the sale of their property was a direct result of the tree clearing on appellees' property, (5) the award was not so grossly excessive as to have violated federal due process, (6) each of appellants were on notice of and could have been charged with a Class C felony of criminal mischief under subdivision (b)(1) of this section with, under § 5-4-201(a)(2), a potential fine of $10,000, plus a violation of § 15-32-101(a)(1), (7) was a misdemeanor, with a potential fine and jail time, and (8) under § 18-60-102(a)(1), appellants had ample notice that their actions could result in a penalty of $25,000 punitive damages. Bronakowski v. Lindhurst, 2009 Ark. App. 513, 324 S.W.3d 719 (2009), rehearing denied, — Ark. App. —, — S.W.3d —, 2009 Ark. App. LEXIS 669 (July 29, 2009), review denied, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 804 (Dec. 3, 2009).

5-38-204. Criminal mischief in the second degree.

(a) A person commits criminal mischief in the second degree if the person:

(1) Recklessly destroys or damages any property of another person; or

(2) Purposely tampers with any property of another person and by the tampering causes substantial inconvenience to the owner or another person.

(b) Criminal mischief in the second degree is a:

(1) Class A misdemeanor if the amount of actual damage is one thousand dollars ($1,000) or more but less than five thousand dollars ($5,000);

(2) Class D felony if the amount of actual damage is five thousand dollars ($5,000) or more; or

(3) Class B misdemeanor if otherwise committed.

History. Acts 1975, No. 280, § 1907; A.S.A. 1947, § 41-1907; Acts 1989, No. 735, § 1; 2011, No. 570, § 30.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "Legislative intent. The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Amendments. The 2011 amendment rewrote (b)(1) and (b)(2).

CASE NOTES

Evidence.

Judgment notwithstanding the verdict was properly granted in a malicious prosecution case where the passenger of a truck was arrested when the vehicle bumped a key-card entry gate; even if there was no damage to the gate or a mistake about such, there was still probable cause for an arrest for criminal mischief or attempt under Ark. R. Crim. P. 4.1(c). Coombs v. Hot Springs Village Prop. Owners Ass'n, 98 Ark. App. 226, 254

S.W.3d 5 (2007), rehearing denied, Coombs v. Hot Springs Vill. Prop. Owners Ass'n, — Ark. App. —, — S.W.3d —, 2007 Ark. App. LEXIS 543 (May 2, 2007).

As the victim exited her truck, a man grabbed her by her neck, put a gun to her head, and asked for her keys; she was forced into her residence and heard a shotgun fire as the man drove away. The police spotted the truck traveling at a high rate of speed apparently in flight from the scene of the crime and defendant's fingerprint was recovered from the doors; the evidence was not sufficient to sustain defendant's conviction for aggravated robbery, theft of property, and criminal mischief because there was no way to determine when defendant touched the truck. Turner v. State, 103 Ark. App. 248, 288 S.W.3d 669 (2008), review denied, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 514 (Jan. 22, 2009).

Cited: Misenheimer v. State, 100 Ark. App. 189, 265 S.W.3d 764 (2007).

5-38-205. Impairing the operation of a vital public facility.

(a) A person commits the offense of impairing the operation of a vital public facility if, having no reasonable ground to believe he or she has a right to do so, the person knowingly causes a substantial interruption or impairment of an operation of a vital public facility by:

(1) Damaging the property of another person;

(2) Incapacitating an operator of a vital public facility; or

(3) Engaging in:

(A) A fight or violent and tumultuous behavior; or

(B) Any other conduct that causes a substantial disruption, obstruction, or impediment to the operation of a vital public facility.

(b)(1) Except as provided in subdivision (b)(2) of this section, impairing the operation of a vital public facility is a Class C felony.

(2) Impairing the operation of a vital public facility under subdivision (a)(3) of this section is a Class A misdemeanor.

(c) As used in this section, "vital public facility" includes a county jail, city jail, public detention facility, or temporary holding facility for detained persons.

History. Acts 1975, No. 280, § 1908; A.S.A. 1947, § 41-1908; Acts 2009, No. 1210, § 1; 2011, No. 1120, § 9.

Amendments. The 2009 amendment inserted (a)(3); inserted "Except as provided in subdivision (b)(2) of this section" in (b)(1); added (b)(2) and redesignated the existing text of (b) accordingly; added (c); and made related changes.

The 2011 amendment substituted "vital public facility" for "vital facility" in (a)(3)(B).

5-38-206. Damaging wires and other fixtures of telephone, cable, and electric power companies.

(a) It is unlawful for a person to knowingly damage, destroy, or pull down:

(1) A telephone, cable communications, or electric power transmission pedestal or pole owned or operated by a telephone, cable, or electric power company;

(2) A telephone, cable communications, or electric power line, wire, fiber insulator, power supply transformer, transmission, or other apparatus, equipment, or fixture used in the transmission of telephone,

cable communications, or electric power owned or operated by a telephone, cable, or electric power company; or

(3) Equipment related to wireless communications that are regulated by the Federal Communications Commission.

(b) It is unlawful for a person to knowingly damage, destroy, remove, or alter in a way that could result in physical injury any electric power line, gas line, water line, wire or fiber insulator, electric motor, or other similar apparatus connected to a farm shop, an on-farm grain drying and storage complex, a heating and cooling system, an environmental control system, an animal production facility, an irrigation system, or a dwelling.

(c) A violation of this section is a Class D felony.

History. Acts 2009, No. 390, § 1; 2011, No. 1120, § 10.

Amendments. The 2011 amendment rewrote (b).

Subchapter 3 — Arson and Other Burning

SECTION.

5-38-301. Arson.

(a) A person commits arson if he or she:

(1) Starts a fire or causes an explosion with the purpose of destroying or otherwise damaging:

(A) An occupiable structure or motor vehicle that is the property of another person;

(B) Any property, whether his or her own or property of another person, for the purpose of collecting any insurance for the property;

(C) Any property, whether his or her own or property of another person, if the act thereby negligently creates a risk of death or serious physical injury to any person;

(D) A vital public facility;

(E) Any dedicated church property used as a place of worship exempt from taxes pursuant to § 26-3-301; or

(F) Any public building or occupiable structure that is either owned or leased by the state or any political subdivision of the state; or

(2) Recklessly causes a fire or an explosion in the course of and in furtherance of a felony or in immediate flight after committing a felony that results in destroying or otherwise damaging:

(A) Any occupiable structure or motor vehicle;

(B) Any property, if the fire or explosion creates a risk of death or serious physical injury to any person;

(C) A vital public facility;

(D) Any dedicated church property used as a place of worship exempt from taxes pursuant to § 26-3-301; or

(E) Any public building or occupiable structure that is either owned or leased by the state or any political subdivision of the state.

(b) Arson is a:

(1) Class A misdemeanor if the property sustains less than five hundred dollars ($500) worth of damage;

(2) Class D felony if the property sustains at least five hundred dollars ($500) but less than two thousand five hundred dollars ($2,500) worth of damage;

(3) Class C felony if the property sustains at least two thousand five hundred dollars ($2,500) but less than five thousand dollars ($5,000) worth of damage;

(4) Class B felony if the property sustains at least five thousand dollars ($5,000) but less than fifteen thousand dollars ($15,000) worth of damage;

(5) Class A felony if the property sustains at least fifteen thousand dollars ($15,000) but less than one hundred thousand dollars ($100,000) worth of damage; or

(6) Class Y felony if the property sustains damage in an amount of at least one hundred thousand dollars ($100,000).

(c) As used in this section, "motor vehicle" means every self-propelled device in, upon, or by which any person or property is, or may be, transported or drawn upon a street or highway.

(d)(1)(A) If the Governor deems it necessary, he or she may offer a reward not to exceed fifty thousand dollars ($50,000) for information leading to the apprehension, arrest, and conviction of a person who has committed, attempted to commit, or conspired to commit a criminal offense under this section.

(B) The fifty-thousand-dollar reward maximum imposed by this section only applies to state-appropriated funds.

(C) The Governor may increase the amount of any reward offered by use of funds from the Reward Pool Fund created in this section.

(2) When the Governor offers a reward pursuant to this section, he or she may place any reasonable condition upon collection of the reward as he or she deems necessary.

(3)(A) The Governor may establish and administer a fund to be known as the "Reward Pool Fund".

(B) Any monetary donation or gift made by a private citizen or corporation for the purpose of offering a reward or enhancing a state-funded reward offered for information leading to the apprehension, arrest, and conviction of a person who has committed, attempted to commit, or conspired to commit a criminal offense under this section shall be deposited in the fund.

(C)(i) The Governor shall have the sole discretion to determine if and how much of the fund is offered in a particular criminal case.

(ii) However, if the donor places any lawful restriction or instruction on use of the donation at the time it is given, the restriction or instruction shall be honored.

(4) Any person completing the requirements to be eligible for the reward is entitled to the reward offered by the Governor, and the

Governor shall certify the amount of the reward to the Auditor of State, who shall issue his or her warrant on the State Treasury for the reward, to be paid out of any money appropriated or deposited into the fund.

History. Acts 1975, No. 280, § 1902; 1981, No. 544, § 1; A.S.A. 1947, § 41-1902; Acts 1987, No. 242, § 1; 1991, No. 299, § 1; 1997, No. 921, § 1; 2005, No. 1529, § 1; 2007, No. 827, § 42.

Amendments. The 2007 amendment inserted "fund to be known as the" in (d)(3)(A).

CASE NOTES

Evidence.

There was substantial evidence to convict defendant of arson because (1) a firefighter stated that, while responding to the fire, he saw defendant walking away from the crime scene; (2) the daughter-in-law of the victim's next door neighbor saw a pedestrian trying to hide his face from her as she drove past him, and she testified that defendant would have known her truck because she was at her mother-in-law's home about three days a week; (3) a reserve deputy who handled bloodhounds testified that his select-scent dog tracked defendant's scent 1.8 miles from a county road to the back door of the victim's mobile home; (4) there were spermatozoa cells present in the victim's rectum, which could generally live only 24 hours there, which gave rise to an inference that defendant had sexual relations with the victim close to the time she died; (5) defendant's DNA was present on the rectal swab and the probability of selecting an individual at random from the general population having the same genetic markers as those from defendant would be one in one trillion; (6) medical evidence showed that the victim was dead before the fire began, implying that she did not start it; and (7) the lead investigator on the fire ruled out any electrical malfunction as the cause of the fire. Wright v. State, 368 Ark. 629, 249 S.W.3d 133 (2007).

5-38-302. Reckless burning.

CASE NOTES

Collateral Estoppel in Civil Case.

For purposes of collateral estoppel, a guilty plea in a criminal case is not equivalent to a criminal conviction that has been "actually litigated." Therefore, in a defense obligation dispute, summary judgment was improperly granted to a homeowners' insurer because collateral estoppel could not have been used to show that an illegal purpose exclusion applied based on a guilty plea to reckless burning under subsection (a) of this section since the issues of intent and purpose were never actually litigated. Bradley Ventures, Inc. v. Farm Bureau Mut. Ins. Co., 371 Ark. 229, 264 S.W.3d 485 (2007).

5-38-310. Unlawful burning.

(a) A person commits the offense of unlawful burning if the person:

(1) Sets on fire or causes or procures to be set on fire any forest, brush, or other inflammable vegetation on another person's land;

(2) Allows a fire that he or she built or has charge of to escape from his or her control or to spread to a person's land other than that of the builder of the fire;

(3)(A) Burns any brush, stumps, logs, rubbish, fallen timber, grass, stubble, or debris of any sort, whether on the person's own land or another person's land, without taking necessary precaution both

before lighting the fire and at any time after lighting the fire to prevent the escape of the fire.

(B) The escape of fire to adjoining timber, brush, or grassland is prima facie evidence that a necessary precaution was not taken;

(4) Builds a camp fire on another person's land without clearing the ground immediately around it of material that will carry fire;

(5) Leaves on another person's land a camp fire to spread on that person's land;

(6) Starts a fire in forest material not the person's own by throwing away a lighted cigar, match, or cigarette or by the use of a firearm or in any other manner and leaves the fire unextinguished;

(7) Defaces or destroys a fire warning notice;

(8) Is an employee of the Arkansas Forestry Commission or an officer charged with a duty of enforcing a criminal law and fails to attempt to secure the arrest and conviction of a person against whom he or she has evidence or can secure evidence of violating a fire law; or

(9) Sets on fire or causes or procures to be set on fire any forest, brush, or other flammable material in violation of a burn ban on outdoor burning declared under § 12-75-108.

(b) Unlawful burning is a Class A misdemeanor.

(c) A bond for costs shall not be required in a court of this state for prosecution for violation of this section.

(d) It is not a violation of:

(1) Subdivision (a)(8) of this section for an employee of the commission to fail to enforce subdivision (a)(9) of this section; or

(2) Subdivision (a)(9) of this section if the person was:

(A) Acting under a permit issued by the chief executive of the political subdivision issuing the burn ban; or

(B)(i) Setting on fire or causing or procuring to be set on fire any crop remainder or remaining vegetation after harvest of the crop on the person's land.

(ii)*(a)* In order to provide a safety barrier between the crop remainder or remaining vegetation and adjacent land, the person shall perform adequate disking of field perimeters or perform other safety measures as required by the county burn ban officer.

(b) If the person does not comply with subdivision (d)(2)(B)(ii)(*a*) of this section, the defense under subdivision (d)(2)(B)(i) is not available, and the person is liable for actual damages to adjacent land caused by the fire.

History. Acts 1935, No. 85, §§ 1, 8; Pope's Dig., §§ 3049, 3056; Acts 1981, No. 845, §§ 1, 2; A.S.A. 1947, §§ 41-1951, 41-1958; Acts 1993, No. 521, § 4; 2005, No. 1994, § 349; 2007, No. 465, § 1; 2009, No. 748, § 23; 2011, No. 1038, § 1.

Amendments. The 2007 amendment added "Except as provided in subsection (c) of this section" in (a)(6), added (a)(7) and (c), and made related changes.

The 2009 amendment deleted "Miscellaneous misdemeanors" from the catchline, in (a), rewrote the introductory language, redesignated (a)(4) through (a)(7) as (a)(4) through (a)(9), deleted "Except as provided in subsection (c) of this section" in (a)(8), and deleted "unless the defendant was acting pursuant to a permit issued by the chief executive of the political subdivision issuing the burn ban"

at the end of (a)(9); inserted (b) and redesignated the subsequent subsection accordingly; deleted former (c); added (d); and made related and minor stylistic changes.

The 2011 amendment added the (d)(2)(A) designation and (d)(2)(B).

CHAPTER 39

BURGLARY, TRESPASS, AND OTHER INTRUSIONS

SUBCHAPTER.
2. Offenses Generally.
4. Offenses Involving Cemetery or Grave Markers.

Subchapter 1 — General Provisions

5-39-101. Definitions.

CASE NOTES

Enter and Remain Unlawfully.

Defendant's conviction for residential burglary was proper pursuant to subdivision (2)(A) of this section because, although defendant might have been licensed or privileged to enter the victim's trailer, he was certainly not licensed or privileged to remain there after he began stabbing the victim and removing his property. Young v. State, 371 Ark. 393, 266 S.W.3d 744 (2007).

Subchapter 2 — Offenses Generally

SECTION.
5-39-202. Breaking or entering.
5-39-204. Aggravated residential burglary.

5-39-201. Residential burglary — Commercial burglary.

CASE NOTES

Analysis

Elements of Offense.
Evidence.

Elements of Offense.

Where defendant admitted that he committed third-degree assault against victim by kicking and banging at the victim's door in an attempt to gain entry, the circuit court did not err in denying defendant's motion for directed verdict on the attempted burglary charge as defendant completed a substantial step towards entry by severely damaging victim's door and left only when the police were in the area. Davis v. State, 368 Ark. 380, 368 Ark. 351, 246 S.W.3d 433 (2007).

Evidence.

Defendant's motion for directed verdict was properly denied where there was sufficient evidence to convict defendant of residential burglary and third degree assault, § 5-13-207(a); defendant took steps to hinder the victim's ability to summon help by turning off the power and pulling out the phone lines, and the fact that defendant had a potentially deadly weapon on his person could at least raise an inference that he intended to, at the very least, place victim in fear for her physical well-being. Diggs v. State, 93 Ark. App. 332, 219 S.W.3d 654 (2005).

Evidence was sufficient to sustain defendant's convictions for aggravated robbery, residential burglary, and felony theft

of property because an accomplice testified that he and defendant had a purpose of committing theft when they went to the victim's apartment, defendant used physical force upon the victim, defendant was armed with a deadly weapon, and a witness testified that she observed defendant carry out a television and load it into the car. Navarro v. State, 371 Ark. 179, 264 S.W.3d 530 (2007).

Defendant's conviction for residential burglary was proper pursuant to subdivision (a)(1) of this section because he carried a knife made from a railroad spike with him on the night of the homicide. The jury could have inferred from that evidence defendant's intent to commit a felony at the time of entrance in to the victim's trailer. Young v. State, 371 Ark. 393, 266 S.W.3d 744 (2007).

Because there was sufficient evidence to support defendant's rape conviction, there was no merit to defendant's argument regarding the sufficiency of the evidence for defendant's residential burglary conviction, in violation of subsection (a) of this section. Young v. State, 374 Ark. 350, 288 S.W.3d 221 (2008).

Where the victim testified that he discovered that two jars of coins were missing from his house after a visit from defendant and his cohort, an employee of a grocery store saw defendant's cohort cash in the coins and then throw away a jar; the theft victim identified the jar as his. In the second case, the victim testified that someone kicked in the door to his home and a five-gallon water jug filled with coins was stolen shortly after he had spoken with defendant and his cohort at a club; based on the circumstantial evidence, defendant's possession of the coins, and his admission that he had stolen coins from the second victim before, the evidence was sufficient to support defendant's conviction for two counts of burglary in violation of subdivision (a)(1) of this section. Mathis v. State, 2009 Ark. App. 181, 314 S.W.3d 280 (2009).

Evidence was more than sufficient to prove that defendant did not have permission to be in the residence, because the victim ran from his residence yelling that he needed help and asking someone to call the police. Lewis v. State, 2009 Ark. App. 504, 323 S.W.3d 640 (2009).

Evidence was sufficient to support defendant's convictions for residential burglary and theft of property where defendant pawned a gun and a pendant that were stolen from the victims' home and, according to a witness, defendant admitted that he participated in the burglary and theft. Stigger v. State, 2009 Ark. App. 596, — S.W.3d — (2009).

Defendant's convictions for two counts of aggravated burglary were proper under subsection (a) of this section and § 5-39-204(a) because defendant's argument that there was no direct proof on the record of defendant holding a gun was without merit since substantial circumstantial evidence supported a finding of guilt, either as a principal or an accomplice. A neighbor verified that one of the intruders had a gun, the victim told the officers that the intruders hid their guns in the closet, where two guns were found, and both intruders were charged in the same instrument, implicating accomplice liability; that provided substantial evidence supporting the finding that the intruders at minimum represented by word or conduct that they were armed as a threat. Hinton v. State, 2010 Ark. App. 341, — S.W.3d — (2010), rehearing denied, — Ark. App. —, — S.W.3d —, 2010 Ark. App. LEXIS 516 (June 2, 2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 399 (Aug. 6, 2010).

Appellant's conviction for residential burglary was affirmed where (1) the evidence showed that an angry appellant attempted to "bust in" the victim's front door to "put it in the couple's face," pushing his arm and body partially through the door and shooting his handgun into the residence; and (2) the evidence was consistent with appellant's guilt and inconsistent with any other reasonable conclusion. Stephens v. State, — Ark. App. —, — S.W.3d —, 2010 Ark. App. LEXIS 382 (Apr. 28, 2010).

Substantial evidence supported defendant's convictions for commercial burglary, criminal mischief, and breaking and entering because the testimony of defendant's accomplice, who was defendant's son, was sufficiently corroborated, as required by § 16-89-111(e)(1), by an officer's testimony as to the items he found in defendant's truck, matching the description of items stolen from a convenience store. The accomplice admitted that he and defendant entered the store by using a cable to pull open the front doors and

that he and defendant used bolt cutters and a pry bar to break into gaming machines, and these items, along with packages of cigarettes stolen from the store, were found by police officers in defendant's truck. Dunlap v. State, 2010 Ark. App. 582, — S.W.3d — (2010).

Cited: Walker v. State, 2010 Ark. App. 63, — S.W.3d — (2010).

5-39-202. Breaking or entering.

(a) A person commits the offense of breaking or entering if for the purpose of committing a theft or felony he or she breaks or enters into any:

(1) Building, structure, or vehicle;

(2) Vault, safe, cash register, safety deposit box, or money depository;

(3) Money vending machine, coin-operated amusement machine, vending machine, or product dispenser;

(4) Coin telephone or coin box;

(5) Fare box on a bus; or

(6) Other similar container, apparatus, or equipment.

(b) It constitutes a separate offense under this section for the breaking or entering into of each separate:

(1) Building, structure, or vehicle;

(2) Vault, safe, cash register, safety deposit box, or money depository;

(3) Money vending machine, coin-operated amusement machine, vending machine, or product dispenser;

(4) Coin telephone or coin box;

(5) Fare box on a bus; or

(6) Other similar container, apparatus, or equipment.

(c) Breaking or entering is a Class D felony.

History. Acts 1975, No. 280, § 2003; A.S.A. 1947, § 41-2003; Acts 1993, No. 296, § 1.

Publisher's Notes. This section is being set out to correct a subdivision designation.

CASE NOTES

Analysis

Evidence.
Vehicle.

Evidence.

Defendant's convictions for breaking or entering and theft of property were affirmed where defendant's fingerprints were found inside the passenger door along the top edge of the window of the car that was broken into. Phillips v. State, 88 Ark. App. 17, 194 S.W.3d 222 (2004), aff'd, 361 Ark. 1, 203 S.W.3d 630 (2005).

When the victim hired defendant to do yard work, he gave him permission to enter the garage where he stored his yard tools; defendant's admission that he stole some equipment from the garage was not sufficient to support his conviction for breaking or entering under this section. The Court of Appeals of Arkansas found that there was not substantial evidence to prove that defendant entered the victim's garage and the adjoining storage room for the purpose of stealing fishing reels and an air compressor/battery charger. White v. State, 2009 Ark. App. 782, — S.W.3d — (2009).

Defendant's conviction for breaking or entering in violation of subdivisions (a)(4) and (a)(6) of this section, was appropriate because the store's general manager viewed a live feed of her store upon receiving an alert on the sound alarm, and she saw defendant on the feed. A reasonable trier of fact could have concluded that the noise was the result of someone breaking

into the coin box; the manager testified that she secured the store upon seeing defendant and that no one entered the store between the time she saw defendant and the time she went to the store the next morning; and a photograph showed defendant to have been the only one in the store at the time the alarm sounded. Haire v. State, 2010 Ark. App. 89, — S.W.3d — (2010).

Defendant's convictions for breaking or entering in violation of subdivision (a)(1) of this section and theft of property were proper because there was substantial evidence showing that defendant, for the purpose of committing a theft or felony, broke into the victim's vehicle. Substantial evidence also existed to support the finding that defendant knowingly took and exercised unauthorized control over the victim's tow-truck keys with the purpose of depriving the victim of them. Washington v. State, 2010 Ark. App. 339, — S.W.3d — (2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 379 (June 24, 2010).

Substantial evidence supported defendant's convictions for commercial burglary, criminal mischief, and breaking and entering because the testimony of defendant's accomplice, who was defendant's son, was sufficiently corroborated, as required by § 16-89-111(e)(1), by an officer's testimony as to the items he found in defendant's truck, matching the description of items stolen from a convenience store. The accomplice admitted that he and defendant entered the store by using a cable to pull open the front doors and that he and defendant used bolt cutters and a pry bar to break into gaming machines, and these items, along with packages of cigarettes stolen from the store, were found by police officers in defendant's truck. Dunlap v. State, 2010 Ark. App. 582, — S.W.3d — (2010).

Defendant's convictions for breaking or entering, in violation of subdivision (1) of this section, and theft of property, in violation of § 5-36-103(a)(1), were supported by the evidence because defendant's unlawful presence near a storage shed, flight from the victim, and association with persons involved in the crimes suggested that defendant jointly participated in the crimes under § 5-2-402(a)(2). Goforth v. State, 2010 Ark. App. 735, — S.W.3d — (2010).

Defendant's conviction for breaking or entering, in violation of subdivision (a)(1) of this section, was proper because defendant was caught red-handed in the victim's house with the contents of the house thrown around and a broken window in the back of the house; defendant ran away from the scene at the first opportunity. It did not matter whether the house was occupiable. Smith v. State, 2011 Ark. App. 162, — S.W.3d — (2011).

Vehicle.

Breaking or entering a vehicle for purposes of committing a theft under this section is not a violent felony for purposes of the Armed Career Criminal Act (ACCA), 18 U.S.C.S. § 924(e); thus, the ACCA was improperly applied to defendant's sentence for violation of 18 U.S.C.S. § 922(g), (j), and his sentence was vacated. United States v. Livingston, 442 F.3d 1082 (8th Cir. 2006).

5-39-203. Criminal trespass.

RESEARCH REFERENCES

Ark. L. Notes. Brill, Arkansas Law of Damages, Fifth Edition, Chapter 30: Real Property, 2004 Arkansas L. Notes 9.

CASE NOTES

Revocation.

When defendant was placed on two years' probation on his plea of guilty to possession of cocaine, one of the conditions was that he not violate any state law; the state petitioned to revoke his suspended imposition of sentence, alleging that he violated his conditions by committing burglary and failed to satisfy court costs. Defendant's plea of guilty to criminal tres-

pass in violation of subdivision (a)(2) of this section alone was sufficient to support the finding that he violated his probation. Johnson v. State, 2009 Ark. App. 527, 334 S.W.3d 419 (2009).

5-39-204. Aggravated residential burglary.

(a) A person commits aggravated residential burglary if he or she commits residential burglary as defined in § 5-39-201 of a residential occupiable structure occupied by any person, and he or she:

(1) Is armed with a deadly weapon or represents by word or conduct that he or she is armed with a deadly weapon; or

(2) Inflicts or attempts to inflict death or serious physical injury upon another person.

(b) Aggravated residential burglary is a Class Y felony.

History. Acts 2007, No. 1608, § 1.

CASE NOTES

Sufficient Evidence.

Evidence was more than sufficient to prove that defendant did not have permission to be in the residence, because the victim ran from his residence yelling that he needed help and asking someone to call the police. Lewis v. State, 2009 Ark. App. 504, 323 S.W.3d 640 (2009).

Defendant's convictions for two counts of aggravated burglary were proper under § 5-39-201(a) and subsection (a) of this section because defendant's argument that there was no direct proof on the record of defendant holding a gun was without merit since substantial circumstantial evidence supported a finding of guilt, either as a principal or an accomplice. A neighbor verified that one of the intruders had a gun, the victim told the officers that the intruders hid their guns in the closet, where two guns were found, and both intruders were charged in the same instrument, implicating accomplice liability; that provided substantial evidence supporting the finding that the intruders at minimum represented by word or conduct that they were armed as a threat. Hinton v. State, 2010 Ark. App. 341, — S.W.3d — (2010), rehearing denied, — Ark. App. —, — S.W.3d —, 2010 Ark. App. LEXIS 516 (June 2, 2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 399 (Aug. 6, 2010).

Circumstantial evidence was sufficient to support defendant's aggravated burglary conviction under subdivisions (a)(1) and (a)(2) of this section because the evidence showed that the victim shot an intruder as the victim leaned over a railing in the house sometime after 2:30 a.m., that defendant appeared at a hospital with a gunshot wound a short time later, that the bullet's trajectory as it traveled through defendant's body was consistent with the shot having been fired from above, that a .45-caliber slug removed from defendant's body and a spent shell casing found in the victim's handgun were the same caliber, that a slug removed from the burglary location was fired from a gun recovered from a vehicle of defendant's girlfriend, and that defendant's shoe prints matched those found on the townhouse's front door. Thornton v. State, 2010 Ark. App. 569, — S.W.3d — (2010).

Defendant's convictions for aggravated residential burglary in violation of subsection (a) of this section and aggravated robbery in violation of § 5-12-103(a) were appropriate because the state provided sufficient evidence to corroborate his accomplices' testimony; even eliminating the accomplice testimony, the remaining evidence presented independently established the crimes and tended to connect defendant with their commission. In part, witnesses testified about defendant being with the accomplices on the day of the crimes and the state also presented a witness's testimony that defendant had sold him the three shotguns that were identified as being the ones stolen from the victim. Tucker v. State, 2011 Ark. 144, — S.W.3d — (2011).

Cited: Stephens v. State, — Ark. App. —, — S.W.3d —, 2010 Ark. App. LEXIS 382 (Apr. 28, 2010).

5-39-214. Unauthorized entry of a school bus — Posting of warning on a school bus.

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Survey of Legislation, 2005 Arkansas General Assembly, Education Law, 28 U. Ark. Little Rock L. Rev. 347.

Subchapter 4 — Offenses Involving Cemetery or Grave Markers

SECTION.
5-39-401. Destruction or removal of a cemetery or grave marker.

5-39-401. Destruction or removal of a cemetery or grave marker.

(a) It is unlawful for any person, corporation, company, or other entity to destroy or carry away any cemetery marker or grave marker.

(b) Destruction or removal of a cemetery marker or grave marker is a Class C felony.

History. Acts 1997, No. 1244, § 1; 2005, No. 1994, § 327; 2005, No. 2232, § 3; 2007, No. 265, § 1; 2009, No. 748, § 24.

Amendments. The 2007 amendment substituted "Class C felony" for "Class D felony" in (b).

The 2009 amendment inserted "marker" following "cemetery" in (b).

CHAPTER 40

PUBLIC LANDS

SECTION.
5-40-103. Removal of improvements to land after forfeiture to state.

5-40-103. Removal of improvements to land after forfeiture to state.

(a) If any land or town or city lot has been forfeited to the State of Arkansas for the nonpayment of taxes and the title of the state to the land or town or city lot has been confirmed, it is unlawful after the date of the confirmation decree for the former owner or any other person to sell, buy, damage, or remove from the land or town or city lot any building, fence, or other improvement on the land or town or city lot.

(b) Upon conviction, any person violating this section is guilty of a Class B misdemeanor and is liable to the State of Arkansas for three (3) times the amount of the value of the building, fence, or other improvement that is sold, bought, damaged, or removed in violation of this section.

History. Acts 1943, No. 224, §§ 1, 2; A.S.A. 1947, §§ 10-308, 10-309; Acts 2005, No. 1994, § 380; 2007, No. 827, § 43.

Amendments. The 2007 amendment, in (a), substituted "sell, buy, damage, or remove" for "remove," and deleted "or to buy or sell any building, fence, or other improvement on the land or town or city lot" at the end; rewrote (b); and made stylistic changes.

CHAPTER 41

COMPUTER-RELATED CRIMES

SUBCHAPTER.

Subchapter 1 — Computer-Related Crime

5-41-102. Definitions.

RESEARCH REFERENCES

Ark. L. Notes. Snow, The Law of Computer Trespass: Cyber Security or Virtual Entrapment?, 2007 Ark. L. Notes 109.

5-41-103. Computer fraud.

CASE NOTES

Jurisdiction.

Arkansas trial court had jurisdiction over defendant, a Georgia resident, during his trial for theft of property and computer fraud where defendant caused the victim, an Arkansas resident, to access her computer by virtue of his email correspondence for the purpose of obtaining money with a false or fraudulent intent, representation, or promise. Powell v. State, 97 Ark. App. 239, 246 S.W.3d 891 (2007).

5-41-104. Computer trespass.

RESEARCH REFERENCES

Ark. L. Notes. Snow, The Law of Computer Trespass: Cyber Security or Virtual Entrapment?, 2007 Ark. L. Notes 109.

Subchapter 2 — Computer Crimes

SECTION.

5-41-201. Definitions.

RESEARCH REFERENCES

Ark. L. Notes. Snow, The Law of Computer Trespass: Cyber Security or Virtual Entrapment?, 2007 Ark. L. Notes 109.

5-41-202. Unlawful act regarding a computer.

(a) A person commits an unlawful act regarding a computer if the person knowingly and without authorization:

(1) Modifies, damages, destroys, discloses, uses, transfers, conceals, takes, retains possession of, copies, obtains or attempts to obtain access to, permits access to or causes to be accessed, or enters data or a program that exists inside or outside a computer, system, or network;

(2) Modifies, destroys, uses, takes, damages, transfers, conceals, copies, retains possession of, obtains or attempts to obtain access to, permits access to or causes to be accessed, equipment or supplies that are used or intended to be used in a computer, system, or network;

(3) Destroys, damages, takes, alters, transfers, discloses, conceals, copies, uses, retains possession of, obtains or attempts to obtain access to, permits access to or causes to be accessed, a computer, system, or network;

(4) Obtains and discloses, publishes, transfers, or uses a device used to access a computer, system, network, or data; or

(5) Introduces, causes to be introduced, or attempts to introduce a computer contaminant into a computer, system, or network.

(b) An unlawful act regarding a computer is a:

(1) Class A misdemeanor; or

(2) Class C felony if the act:

(A) Was committed to devise or execute a scheme to defraud or illegally obtain property;

(B) Caused damage in excess of five hundred dollars ($500); or

(C) Caused an interruption or impairment of a public service, including, without limitation, a:

(i) Governmental operation;

(ii) System of public communication or transportation; or

(iii) Supply of water, gas, or electricity.

History. Acts 2001, No. 1496, § 2; 2007, No. 827, § 44.

Amendments. The 2007 amendment inserted "system" in (a)(4), and made a related change.